

(24,245)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 167.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
PLAINTIFF IN ERROR,

*vs.*

LIZZIE L. WRIGHT AND HENRY C. BERGE, ADMINIS-  
TRATORS OF THE ESTATE OF OTTO O. WRIGHT, DE-  
CEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 No. 17189.

WRIGHT

vs.

CHICAGO, R. I. & P. Co.

Pleas before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol in the City of Lincoln, in said State, on the 6th Day of January, 1914.

Present:

Hon. Manoah B. Reese, Chief Justice.

Hon. John B. Barnes, Judge.

Hon. Charles B. Letton, Judge.

Hon. Jacob Fawcett, Judge.

Hon. William B. Rose, Judge.

Hon. Samuel H. Sedgwick, Judge.

Hon. Francis G. Hamer, Judge.

Attest:

H. C. LINDSAY, *Clerk*.

Be it remembered, That on the 6th day of June, 1911, there was filed in the office of the clerk of said supreme court a certain Transcript, in the words and figures, following to-wit:

2 45—41.

LIZZIE L. WRIGHT, Adm'x, et al., Plaintiffs,

vs.

C., R. I. & P. RY. Co., Defendant.

Endorsed: Clerk's Office, District Court, Lancaster County, Nebraska. Filed June 6, 1911. J. S. Baer, Clerk Dist. Court.

3 Pleas in the District Court, Third Judicial District of Nebraska, in and for the County of Lancaster, at the January, A. D. 1911, term of said Court, begun and held in the City of Lincoln, in said County and State, on the 23rd day of January, in the year of our Lord One Thousand Nine Hundred and Eleven, and on a day therein, to wit, on the 23rd day of March, A. D. 1911, (that being the 51st Judicial day of the January, A. D. 1911, term of said Court.)

Present: Honorable Lincoln Frost, Judge presiding; H. V. Hoagland, Sheriff, and J. S. Baer, Clerk.

Be it remembered, That at the several times hereinafter set forth were filed in the office of the clerk of said Court papers of which

the following are true and correct copies and proceedings were had and done in the cause below named as follows, to-wit:

*Petition.*

In the District Court of Lancaster County, Nebraska.

LIZZIE L. WRIGHT, and HENRY C. BERGE, Administrators of the  
Estate of Otto O. Wright, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corpora-  
tion, Defendant.

4 For cause of action against the defendant plaintiff avers:  
1. That on the 9th day of December, 1909, Otto O. Wright died intestate in Lincoln, Lancaster County, Nebraska, having in said County an estate to be administered upon; that on the 20th day of May, 1910, the plaintiffs were duly appointed, by the County Court of Lancaster County, Nebraska, administrators of said estate; that they have qualified as such administrators and are now acting as such.

2. That the plaintiff Lizzie L. Wright is a resident and citizen of the city of Denver and State of Colorado and at the time of the filing of this petition is a resident and citizen of the city of Denver and State of Colorado; that the plaintiff Henry C. Berge is a resident and citizen of the city of Lincoln, Lancaster County, Nebraska, and at the time of the filing of this petition is a resident and citizen of the city of Lincoln, Lancaster County, Nebraska.

3. That the defendant, Chicago, Rock Island & Pacific Railway Company is a corporation and citizen of the State of Illinois and at the time of the filing of this petition is a citizen of the State of Illinois.

4. That the defendant during all the times hereinafter mentioned owned and operated a line of railroad through the State of Nebraska and was doing business as a common carrier of freight and passengers in said State and as such common carrier owned and maintained roadbeds, right of ways, tracks, engines, tenders, and cars, and employed engineer, fireman, brakeman, flagman, switchman and trainmen of every kind, to operate and control the movements of its trains, engines and switch engines, and maintained depots and train dispatchers, and generally owned property and employed men to construct its railroad business in the State of Nebraska.

5. That at the time and for several years prior to the time of the commission of the wrongs and injuries herein complained of, said deceased Otto O. Wright was employed by the defendant as a locomotive engineer upon its lines of railroad; that on or about the 9th day of December, 1909, the deceased Otto O. Wright was sent with an engine of the defendant from Fairbury, Nebraska, to Omaha, Nebraska, for the purpose of taking said engine to a repair shop for repairs, and while taking said engine where he has been directed by the defendant and while on his way and on

the 9th day of December, 1909, the defendant, through its servants, agents and employes, carelessly and negligently ran another engine, being a switch engine, violently against and into the engine that plaintiff's intestate was running, whereby plaintiff's intestate was caught between the cab and tender of the engine, pinioned beneath the wreckage of his engine, and subjected to injuries that resulted almost immediately in his death; that after the collision the defendant, instead of removing plaintiff's intestate, who was still alive, from the wreck, carelessly and negligently allowed him to remain there, and negligently permitted forty-five (45) minutes to elapse before extricating him from the wreck; that said collision and injury occurred on the defendant's track and right of way near Nineteenth and Holdrege Streets in the city of Lincoln, Nebraska, at a point about one hundred (100) feet north of where the track of the defendant runs underneath an overhead bridge, known as the Holdrege Street bridge; that the defendant's track makes an abrupt curve both south of, under and north of the bridge, for a considerable distance, and that about two hundred (200) feet north and east of the bridge aforesaid and about fifty (50) feet north of where the two engines colided, the track makes an abrupt turn north and east, and

6 said curve runs through a deep cut at said point, and the defendant negligently constructed said cut in such narrow manner making it impossible for an engineer going north under the bridge to see an engine coming south just before said engine emerges from behind the acute portion of the cut aforesaid; that the danger at this point is augmented by the fact that the curve for a considerable distance south of, and for a short distance north of, the overhead bridge aforesaid, is comparatively gradual and open, giving one advancing from the south in a northerly direction, the impression that no train or engine can approach from the opposite direction without its approach being apprehended and seen for a long distance ahead; that the danger is further increased by the fact that the curve both under the bridge and for a considerable distance north and east thereof runs through a deep cut that is heightened by the abutments that support the overhead bridge.

6. That the collision and injury aforesaid occurred wholly without fault or negligence on the part of the plaintiff's intestate, but did occur because of the negligence of the defendant; that the injuries and death of plaintiff's intestate were caused and are the proximate result of the negligence of the defendant as hereinafter alleged; that said intestate had never been over this portion of defendant's track and that he was entirely unacquainted therewith and that defendant gave him no information whatever in respect to peculiar, great and unusual danger in going around said curve; that plaintiff had full and complete running orders over the track that he was running on at the time he was killed, and that he had his engine under perfect control and that he was running, at the time of the injury complained of, in strict compliance with the orders of the defendant.

7 That said Otto O. Wright was killed on account of the negligence of the defendant which plaintiffs aver is as follows:

7 (a) The defendant was negligent and careless in the construction of its roadbed and right of way where the injury complained of was inflicted in that said roadbed not only lies in a deep cut under an overhead wagon road bridge, known as the Holdrege Street bridge, but it also makes an abrupt turn in this same cut aforesaid, just north of the bridge aforesaid, making it utterly impossible for engineers or trainmen or engines or trains, approaching on both sides of said turn from opposite directions to see each other until it is too late to avert a collision; that the defendant was negligent in constructing its said roadbed with such an acute curve in said cut and that the defendant was negligent in excavating said cut in this: that said cut is too narrow and should have been made wider so that engineers approaching each other could see each other when still far enough apart, while running their engine under control, to stop and avert a collision; that said curve and cut at the place where plaintiff's intestate was killed is so constructed that two engineers running toward each other and both under control, cannot stop and avert a collision, after seeing each other.

(b) The defendant was negligent in failing to provide suitable automatic or other safeguards or signals to warn approaching trainmen of the danger and of the presence behind the curve and in the cut aforesaid, of other trains upon the same track; and especially in failing to provide the block system and semaphore which is a device and system generally recognized by experienced railroad men as efficient and adequate to prevent accidents and collisions at such points and which are in general and common use at the present time on well regulated railroads at dangerous places such as where  
8 plaintiff's intestate was killed; and especially in failing to provide a gong, which is very inexpensive and which would have been a warning to plaintiff's intestate of the presence of defendant's other engine coming southward and which would have prevented the accident and injury; that said cut and curve was such a place of unusual, extraordinary and great danger other persons having been killed at the same place, of which the defendant had notice, and well knowing the dangerous character of said curve and cut, making it obligatory upon the defendant to take some precautionary measure to prevent further accidents and injury, and the death of plaintiff's intestate.

(c) The defendant was negligent in failing to station a flagman at the place aforesaid where the collision occurred to warn plaintiffs' intestate and other approaching trains of impending danger, because said curve and cut were places of such unusual and great danger, which was known to defendant, as to make it obligatory upon the defendant to take some precautionary measure to prevent injuries just such as the injury to plaintiffs' intestate.

(d) The defendant was negligent and careless in failing to adopt a safe and effective system of operating its railway trains and one reasonably calculated to protect the life and limb of its servants and employees in this; in failing to promulgate suitable rules for the safety of its employees in the conduct of the business of the operation of its trains, the management of its yards in the city of Lincoln,

Nebraska, and especially in failing to provide suitable rules for the operation in and near said yards, providing that said switch engines shall be bound to watch not only for first class trains, but also for all trains operated under special running orders and to clear the track for the same, instead of providing as said defendant does in its rules promulgated and enforced, that said switch engines are bound only to watch for first class trains and for passenger trains and as for all other trains, need only run under control; the defendant was negligent in giving the deceased, Otto O. Wright, the running orders from Lincoln to Havelock, as was the case, without notifying said Otto O. Wright that said track was occupied by any other engine, and without notifying said other switch engine that said Otto O. Wright had orders over said road at said time; the defendant was negligent in not having rules that provided that its switch engine within the yard limits, coming around said curve, should always sound its whistle and ring its bell, which was not done in this case, and for which the defendant has no rule; the defendant was negligent in not having a rule that one of its brakemen on its switch engine should ride on the front footboard of said engine and in that way be better enabled to discover approaching trains from the other direction.

(e) The defendant was negligent in failing to give said Otto O. Wright timely warning through its servants and employes, the engineer and fireman of the switch engine aforesaid by bell or whistle, of the approach upon the same track of said switch engine that the defendant was negligent in not having one of its switchmen on said switch engine stationed on the foot board of said switch engine, coming around the curve, enabling the defendant to discover the engine of plaintiff's intestate in time to stop the same and prevent the collision and injury to plaintiffs' intestate.

10 (f) The defendant was negligent in failing to fasten securely in readily accessible place on intrstate's engine and on said switch engine, emergency tools such as jacks, etc., whereby said intestate could have been extricated from underneath the wreckage where he was pinioned, without delay; and in failing and neglecting, through its servants, agents and employes, to locate and use the jacks and other tools that were actually on or about said engine instead — waiting to send down to the south yards in the city of Lincoln, Nebraska.

(g) The defendant was negligent in failing to apprise and inform plaintiffs' intestate of the dangerous character of the curve and cut aforesaid.

(h) The defendant was negligent in failing to install the block system and semaphore at the place of the injury aforesaid, or at least to have a gong at said place or a flagman stationed thereat, after it received notice of the dangerous character of said place and curve by the death of one Disher who was killed at said same place only about a year prior to the injury causing the death of plaintiffs' intestate and after it had notice of another collision which occurred at said place about a year prior to the death of plaintiffs' intestate.

(i) The defendant was negligent in not providing for plaintiffs' intestate a safe place in which to work, but negligently gave him running orders from Lincoln to Havelock over and upon said track and around said curve, when as a matter of fact there was another engine on said track which was known to the defendant and unknown to plaintiffs' intestate.

11 (j) When said collision occurred and when plaintiffs' intestate was killed plaintiffs' intestate had his engine under proper control and immediately upon the discovery of said switch engine upon said track, plaintiffs' intestate reversed his engine and did all within his power to stop the same and that the collision of said engine and the death of plaintiffs' intestate would have been averted except for the fact that the defendant's agents and employees upon said switch engine, as soon as they discovered the engine of plaintiffs' intestate, jumped from their said switch engine without reversing the same and without trying to stop the same, and that on account of said negligence, caused said injury and the death of plaintiffs' intestate; that if the engineer and fireman upon said switch engine had *staid* with their said engine and reversed the same and tried to stop the same, as plaintiffs' intestate did that both of said engines would have been brought to a standstill without a collision and the life of plaintiffs' intestate saved; that the death of plaintiffs' intestate was caused by the negligence of said engineer and fireman on said switch engine in not reversing their said engine and stopping the same upon the discovery of the engine by plaintiffs' intestate.

(k) The defendant was negligent in this; After the engineer and fireman on said switch engine discovered the perilous situation of plaintiffs' intestate on said engine and railroad track, they failed to exercise reasonable care to avoid injury to him, but without reversing their engine, jumped from their said engine and allowed the same at a dangerous and reckless rate of speed to run into plaintiffs' intestate and killed him; that such negligence was willful and the injury to plaintiffs' intestate might have been averted except for the willful and wanton negligence of defendant's servants and agents.

12 (l) That the defendant was negligent in running its said switch engine around said curve at a negligent, reckless and dangerous rate of speed and without having the same under control.

8. That at the time of his death, the said Otto O. Wright was thirty two (32) years of age and prior to said injury was in good robust health and able to earn and did earn One Hundred Fifty (\$150) per month which he devoted to the support and maintenance of his family, consisting of his wife, one of the plaintiffs Lizzie L. Wright.

9. That by reason of the negligence of the defendant as herein before alleged, causing the death of said Otto O. Wright, said widow and said estate has been damaged in the sum of Twenty-five Thousand Dollars (\$25,000).

Wherefore plaintiffs pray for judgment against said defendant

in the sum of Twenty-five Thousand Dollars (\$25,000) together with costs of suit.

LIZZIE L. WRIGHT AND  
HENRY C. BERGE,  
*Administrators of the Estate of Otto O.  
Wright, Deceased, Plaintiffs,*  
By C. W. BERGE, *Their Attorney.*

13 STATE OF NEBRASKA,  
*Lancaster County, ss:*

Henry C. Berge, being first duly sworn on oath says that he is one of the plaintiffs in this case; that he has read the foregoing petition knows the allegations herein contained and that they are true as he verily believes.

HENRY C. BERGE.

Subscribed in my presence and sworn to before me this 18th day of August, 1910.

BRUCE FULLERTON,  
*Justice of the Peace.*

To the Clerk of said Court:

Please issue summons for the defendant in the above entitled cause and deliver the same to the sheriff of said County. Make same returnable according to law.

LIZZIE L. WRIGHT AND  
HENRY C. BERGE,  
*Administrators of the Estate of Otto  
O. Wright, Deceased, Plaintiffs,*  
By G. W. BERGE, *Their Attorney.*

Endorsed: 45—41. Lizzie L. Wright, and Henry C. Berge, Administrators of the estate of Otto O. Wright, Deceased, Plaintiff, vs. Chicago, Rock Island & Pacific Railway Company, a corporation, Defendant. Petition and præcipe—Clerk's Office, District Court Lancaster County, Nebraska—Filed Oct. 19, 1910. J. S. Baer, Clerk Dist. Court.

14 *Amended Answer.*

In the District Court of Lancaster County, Nebraska.

45—41.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the Estate of Otto O. Wright, Deceased, Plaintiffs,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Comes now the defendant, The Chicago, Rock Island and Pacific Railway Company, and for answer to plaintiffs' petition alleges and says.

## I.

The defendant denies each and every allegation in plaintiff's petition contained.

## II.

The defendant for further answer alleges the fact to be, that the injury, if any, received by plaintiffs' decedent on the 9th day of December, 1909 was not caused by or the result of or in any manner attributable to any negligence or carelessness of this defendant company, or any of its servants, agents or employes, on the other hand, the defendant company alleges that the injury was caused, by and was the direct result of the carelessness and gross negligence of plaintiffs' decedent and that said gross negligence of said Otto O.

Wright was in the following particulars to-wit:

15 That the point at which the accident alleged in plaintiffs' petition occurred, is within the yard limits of the defendant company in the City of Lincoln, Nebraska; that the defendant Company had in force at said time and had promulgated a set of rules and time tables governing the operation and running of engines, such as the said Otto O. Wright was running, and governing engine men, which rules and time tables provide among other things:

## Rule A.

"Employes whose duties are prescribed by these rules must provide themselves with a copy.

## Rule B.

"Employes must be conversant with and obey the rules and special instructions. If in doubt as to their meaning they must apply to proper authorities for an explanation."

## Rule D.

"Persons employed in any service on trains are subject to the rules and special instructions."

## Rule 97a.

"Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks, protecting themselves against over due trains. Extra trains must protect themselves within the yard limits."

## Rule 106.

"In all cases of doubt or uncertainty the safe course must be taken and no risks run."

## Rule 718.

16 "The engine man must have a reliable watch; a copy of the Time Table and a full set of signals; examine the general Order Board before each trip."

Rule 16 of Time table 11-D, which was the time table issued by the defendant Company and in force at the time of the accident referred to in plaintiff's petition, which governed the operation of its trains by its engineers operating trains in the state of Nebraska, provided.

"All except first class trains will approach (enter and pass through the following named yards under full control) expecting to find main track occupied or obstructed.

Albright  
Fairbury

Lincoln  
Belleville

Jansen  
Phillipsburg."

The defendant alleges that said Otto O. Wright was an able and experienced engineman and engineer, and was familiar with all the rules governing the running and operation of trains, and governing engineers, issued and promulgated by this defendant Company in force at the time of the accident in which he met his death, and was familiar with the yard limits of said Company in the City of Lincoln. But notwithstanding said rules, the plaintiff's decedent did not run his engine under full control in the yard limits of the City of Lincoln as by rule required, and was not running and did not have his engine under control at the time of his injury, but was carelessly and negligently running his engine, which the defendant alleges was not a first class train but an extra train, at an excessive and negligent rate of speed, and not under full control within the Lincoln yard limits, and carelessly and negligently disobeyed said rules, which disobedience and which carelessness and negligence was gross negligence, and was the proximate cause of decedent's death, for all of which this defendant is nowise liable.

### III.

Further answering, the defendant alleges that the wrong and injury, if any complained of in plaintiffs' petition resulted from the risks incident to the employment of plaintiffs' decedent; that the acts conditions, dangers and risks which the plaintiffs allege caused the death of said Otto O. Wright, were obvious to him and he had full knowledge thereof; and the defendant alleges that plaintiffs' decedent assumed said risks and the dangers resulting therefrom. That plaintiffs' decedent assumed all the ordinary risks incident to the business in which he was engaged and especially all the risks, dangers and defects alleged in plaintiffs' petition and the defendant alleges that the injury which the said Otto Wright sustained, resulted from risks that were incident to his employment and were assumed by him when he accepted the employment in which he was engaged at the time of the alleged injury for all of which the defendant is nowise liable.

### IV.

The defendant further alleges that the risks resulting from the presence of the curve and the cut at Holdrege Street, and from the presence of the viaduct and high embankment, which the plaintiffs

allege obstructed the view of the risks resulting from the lack of gongs, signals, automatic devices and semaphores at said curve, and from the absence of a flagman at said curve, as alleged in plaintiffs' petition, were obvious to plaintiffs' decedent, and were well known to him, and were assumed by him. Further, that the risks resulting from the runnings of a switch engine within the yard limits and upon the defendant's tracks, and the risks resulting from the presence of switch engines on said tracks, were incident to the employment of plaintiffs' decedent and were known to him and were assumed by him, and for an injury resulting from such risks, this defendant is no wise liable.

## V.

The defendant further answering, alleges that it owns and operates a steam railway system running through Nebraska, Iowa and Illinois, and other states, and is engaged in commerce between the several states; and that at the time of the injury complained of — the plaintiffs' petition, the said engine was being taken, and the said Otto O. Wright, was taking the same from Fairbury, Nebraska, to Silvis, Illinois, and that at the time of his injury and death, the said Otto O. Wright, was employed by this defendant in interstate commerce, and was engaged in interstate commerce, and that this court by reason thereof, is without jurisdiction of the subject matter of this suit.

Wherefore, the defendant prays that judgment may be for it and that plaintiffs' cause of action be dismissed, and for judgment for costs.

THE CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY COMPANY, *Defendant*,

By E. P. HOLMES &

G. L. DE LACEY, *Its Attorneys*.

19 STATE OF NEBRASKA,  
*Lancaster County, ss:*

E. P. Holmes being first duly sworn upon his oath deposes and says he is attorney for the said defendant Company, a foreign corporation. That he has read the foregoing Answer and knows the facts therein set forth, and says that the allegations therein contained are true.

E. P. HOLMES.

Subscribed in my presence and sworn to before me this 6th day of January A. D. 1911.

[SEAL.]

CARIE L. AKESON,  
*Notary Public*.

Endorsed: 45—41—In the District Court of Lancaster County, Nebraska—Lizzie L. Wright, et al., Plaintiffs, vs. The Chicago, Rock Island and Pacific Railway Company a corporation, Defendant. Amended Answer—Clerk's Office District Court Lancaster County, Nebraska—Filed Jan. 6, 1911. J. S. Baer, Clerk Dist. Court.

*Reply.*

In the District Court of Lancaster County, Nebraska.

45—41.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the  
Estate of Otto O. Wright, Deceased, Plaintiffs,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

20. Come now the plaintiffs and for their reply to the defend-  
ant's amended answer deny each and every allegation therein  
contained inconsistent with the averments of plaintiffs' petition.

LIZZIE L. WRIGHT AND  
HENRY C. BERGE,

*Administrators of the Estate of Otto O.*

*Wright, Deceased, Plaintiffs,*

By G. W. BERGE,

*Their Attorney.*

STATE OF NEBRASKA,  
*Lancaster County, ss:*

Henry C. Berge, being first duly sworn on oath says that he is  
one of the plaintiffs in the above entitled action; that he has read  
the foregoing reply, knows the allegations therein contained and  
that they are true as he verily believes.

HENRY C. BERGE.

Subscribed in my presence and sworn to before me this 16th  
day of January, 1911.

[SEAL.]

JAMES L. CALDWELL,  
*Notary Public.*

Endorsed: 45—41. Lizzie L. Wright, and Henry C. Berge Ad-  
ministrators of the estate of Otto O. Wright, Deceased, Plaintiffs, vs.  
The Chicago, Rock Island & Pacific Railway Company a Corpora-  
tion Defendant. Reply. Clerk's Office District Court Lancaster  
County, Nebraska, Filed Jan. 16, 1911. J. S. Baer, Clerk Dist.  
Court.

*Instructions Requested by the Defendant.*

In the District Court of Lancaster County, Nebraska.

21

45—41.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the  
Estate of Otto O. Wright, Deceased, Plaintiff,  
vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
Defendant.

GENTLEMEN OF THE JURY:

Instruction No. 1.

You are instructed that under the evidence in this case, the plaintiffs have not offered sufficient evidence to establish any negligence on the part of the defendant, or on the part of the defendant's employes, upon which to base a verdict for damages against the defendant Company, and you will therefore, find by your verdict in favor of the defendant.

Refused.

Instruction No. 2.

You are instructed that the evidence of the plaintiffs show- as a matter of law, the plaintiffs' decedent, Otto O. Wright, was guilty of gross negligence upon his part in the running of his extra engine Number 1486 along and over the curve on defendant's line of railway, in the Company's yards at the City of Lincoln, Nebraska, the rate of speed of ten miles per hour the evidence of the plaintiffs showing conclusively that said engine Number 1486 was run at the time of the accident complained of in this cause at such rate of speed namely ten miles per hour, and as a matter of law you are instructed that at the time and place such engine would not have been under control as provided by the laws or rules of said defendant Company now in evidence before you, and such a rate of speed would have been in violation of such rules and would constitute gross negligence as you have been herein instructed on the part of said Otto O. Wright, and the plaintiffs on account thereof, could not recover in this case and your verdict should be for the defendant company.

22

Refused.

Instruction No. 3.

The evidence in this case establishes the fact that the death of said Otto O. Wright, was caused by no act of negligence on the part of the said defendant company, or that of its employes, but was the result of the decedent's neglectful violations of the rules promulgated and published by defendant Company, and of which decedent had knowledge, and which rules were so promulgated and published by defendant company, for the purpose of protecting the

safety of its passengers and employes; and you are further instructed that — any violation of such rules which resulted in the accident complained of in this case, and constituting gross negligence on the part of said Otto O. Wright, a recovery by the plaintiffs herein could not be had.

Refused.

#### Instruction No. 4.

You are further instructed that if you find and believe from the evidence, that had the said Otto O. Wright obeyed all of the rules of said defendant Company, governing the operation of his engine, at the time and place complained of, and that the said Otto O. Wright had knowledge of such rules so promulgated by the defendant Company, and if you further find and believe from the  
23 evidence that the accident and the injury complained of, by which the decedent met his death, would have been avoided had the said Otto O. Wright observed such rules, then and in that event you *and* instructed, that the violation of such rules was the proximate cause or the immediate cause of the said Wright's death and that the plaintiffs could not recover, and your verdict should be for the defendant.

Refused.

#### Instruction No. 5.

You are further instructed that questions have been asked of witnesses during the trial of this cause, as to other accidents happening at the place complained of in this case, and the absence of semaphores, flagman, and other alarm signals, and in this regard you are instructed that such testimony was not material in the trial of this cause and has been by the Court excluded and cannot be considered as acts of negligence and therefore in arriving at your verdict in this case, you will not be influenced in any manner by such questions having been propounded, and you are instructed that you will give no consideration to such fact or facts which by the ruling of the court, has been excluded in this case.

Refused.

#### Instruction No. 6.

You are further instructed that the construction of the defendant company's railway along and through the City of Lincoln and around the curve and through the cut in question in this case is not to be taken into consideration by you in determining the question of any negligence on the part of the defendant Company, for the reason that the Court has excluded all  
24 of such evidence, and such facts are not for you to take into consideration in determining the question of negligence on the part of the defendant Company, but all of such evidence so far as the questions of negligence itself is concerned, shall be considered by you in arriving at your verdict.

Refused.

## Instruction No. 7.

(a) The Court instructs you that the defendant was not an insurer of the plaintiffs' intestate's safety at the time and place here in question; and you are instructed that you cannot infer or presume that the defendant or its servants were negligent at the time and place of this collision, or find a verdict in the plaintiffs' favor from the mere fact that the engine which the deceased was running and defendant's switch engine collided and in said collision the plaintiffs' intestate was so injured that death resulted therefrom.

(b) The Court instructs the jury that a railroad company is not an insurer of the lives and limbs of its servants, and it cannot be held liable for the injury sustained by the servants unless it or its servants were guilty of some act of negligence which was the proximate cause of the injury; and that you cannot find a verdict for plaintiffs merely because plaintiffs' interstate was injured.

(c) The Court further instructs the jury that in considering its verdict the jury should not be governed by sympathy, because of the death of the said Otto O. Wright while in the employe of defendant, or have any prejudice or feeling either in favor of or against the plaintiffs or defendant, but it should only in arriving at its verdict be governed by the evidence and instructions of the Court.

(d) The Court further instructs the jury that if they shall  
25 believe from the evidence that the plaintiffs' intestate sustained the injuries complained of as the direct and natural result of an accident, and not as the direct and natural result of the negligence of defendant, or its agents or employes, they must find for the defendant.

Refused.

## Instruction No. 8.

You are instructed that when the said Otto O. Wright entered the service of defendant as a locomotive engineer he assumed all the risks which are incident to the prosecution of that employment in the usual and ordinary way, and under the circumstances usually surrounding the running of a locomotive in the operation of a railway; and plaintiffs cannot recover for any injury which may have come to him in the usual and ordinary prosecution of that business.

Refused.

## Instruction No. 9.

You are further instructed that the defendant was not required to insure its locomotive engineers from collisions with switch engines or other like accidents resulting from the management of trains; that defendant's duty to the employes was only to use reasonable care and diligence in the management and operation of its switch engines, and unless you find that the defendant or its agents and employes failed to use reasonable care and diligence in the management of its switch engine, and as a consequence thereof plaintiffs' intestate was injured, you cannot find for plaintiffs.

Refused.

## Instruction No. 10.

26 You are instructed that if you find from the evidence that defendant was guilty of negligence which was the proximate cause of the death of *plaintiff* and if you find also that plaintiffs' intestate was guilty of negligence which contributed to his death, then the plaintiffs cannot recover in this action unless the defendant was guilty of gross negligence and the deceased's negligence was slight as compared with that of the defendant. Also if you find that defendant's negligence was equal to plaintiffs' intestate's negligence, or was not greater than the negligence of plaintiffs' intestate, then the plaintiffs cannot recover.

Refused.

## Instruction No. 11.

And by gross negligence is meant the want of that care which every man of common sense however inattentive he may be takes of his own safety; and negligence cannot be considered gross, unless evidenced by an entire failure to exercise of such slight degree of care as to justify a belief that the person on whom the care was incumbent was indifferent to the safety and welfare of the others and of himself.

And by slight negligence is meant the omission of that vigilance which persons of extraordinary prudence and foresight are accustomed to use, or it may be defined as the failure to exercise great care and diligence.

Refused.

## Instruction No. 12.

You are instructed that the plaintiffs in their petition seek to recover upon the grounds of the lack of semaphores, flagmen, etc. and because of the presence of the cut, curve, *enbankment* and bridge

27 at Holdrege Street, and because of the manner in which the same are located and constructed, but you are instructed that all risks arising from the presence and location of the cut, curve and *enbankment*, and from the lack of semaphore, flagman, or other arrangement to warn persons approaching and passing around said curve of the *a*approach of engines, cars, etc. to said curve from the *opposition* direction, were obvious to plaintiffs' intestate and for any injury resulting therefrom the plaintiffs cannot recover.

Refused.

## Instruction No. 13.

You are instructed that the company has promulgated and published rules governing the operation of locomotive engines and trains in the Lincoln yards; and that under said rules Otto O. Wright was bound to run his engine through the Lincoln yards under full control. You are instructed that an employe if within his power so to do, is bound to obey all of the reasonable rules and instructions of his employer with reference to the conduct of his business, and if you find from the evidence that at or immediately before the

accident, when the engines first came in sight of each other, the said Otto O. Wright was running his engine at a rate of speed so as not to be under full control and that this was the proximate cause of the injury, then you are instructed that Plaintiffs cannot recover.

Refused.

#### Instruction No. 14.

You are instructed that the plaintiffs in this case allege and claim that Otto O. Wright was killed because of the negligence of the defendant in not warning plaintiffs' intestate of the whereabouts of the switch engine. But you are instructed that it appears from the evidence, that no rule, regulation or custom exists which required defendant to notify plaintiffs' intestate of the whereabouts of the switch engine. But on the other hand from the evidence it appears that this accident happened in the yards limits of the city of Lincoln, and within those limits the deceased was bound to look out for said switch engine and was bound to expect the track to be occupied by it at any time and must run his engine under full control, expecting to meet it at any moment. You are instructed that it was not incumbent upon the defendant company to notify Otto O. Wright of the location of said switch engine and no recovery in this case can be predicated upon the defendant's failure to notify decedent of the whereabouts of the switch engine.

Refused.

#### Instruction No. 15.

You are instructed that the plaintiffs in this case allege that deceased was killed because of the failure of the engine crew of the switch engine to keep ringing its bell, which plaintiffs allege was not ringing. But you are instructed that the negligence of the defendant, or its agents in charge of the switch engine, prior to the time the switch engine and Otto O. Wright's engine came in sight of each other, is not to be considered as the same was not the proximate cause of the injury.

Refused.

#### Instruction No. 16.

You are instructed that rule 16 of Time Table 11-D provides that the deceased in the operation of his engine through the Lincoln yards must have in under full control so as to be able to stop it within the distance within which he can see the track ahead, clear and unobstructed. You are instructed that from the evidence, it appears that at the time the two engines came in sight of each other the deceased was running his engine around the curve and in said cut at a rate of speed so as not to be within full control and you are instructed that this gross negligence on his full control and you are instructed that this — gross negligence on his

Refused.

#### Instruction No. 17.

The plaintiffs allege and claim that defendant was negligent in failing to promulgate suitable rules for the safety of its employees

in the conduct of switch engines, its business and the operation of its trains in the yards of the defendant Company in the City of Lincoln. Upon this you are instructed that no recovery can be had upon this alleged claim.

Refused.

Instruction No. 18.

The plaintiffs allege and claim that defendant was negligent in not having one of its switchmen on said switch engine stationed on the front foot board of said switch engine, but you are instructed that no rule or custom of said company required a man to be riding on the foot board of said engine and that no recovery can be had upon this alleged claim.

Refused.

Instruction No. 19.

30 You are instructed that plaintiffs claim that defendant was negligent in failing to provide emergency tools as jacks, etc., on said engines, but you are instructed, that plaintiffs have failed to prove this allegation, and no recovery can be had, based upon said alleged claim.

Refused.

Instruction No. 20.

You are instructed that the plaintiffs allege that no bell was ringing on said switch engine before the accident but you are instructed that the evidence discloses that the bell on said switch engine was ringing and the plaintiffs have failed in the proof of this allegation, and no recovery can be had based on this claim.

Refused.

Instruction No. 21.

Plaintiffs further claim that upon the discovery of the deceased's engine, that the servants of the defendant company failed to exercise reasonable care to avoid injury but allege that without reversing their engine or trying to stop the same, jumped from said engine and allowed the same to run into plaintiffs' intestate's engine. But you are instructed that the evidence in this case discloses, that the engineer in charge of said switch engine upon learning of the approach of the deceased's engine reversed said engine, and threw on the emergency brake, and that the plaintiffs have failed to prove said allegation and no recovery can be based on it.

Refused.

Instruction No. 22.

31 You are instructed that the defendant was not required to insure its locomotive engine-men from collision with switch engines, or other like accidents, resulting from the management of trains; the defendant's duty to the employees was only to use due care and diligence to the employees in the management and operation of the trains, and unless you find that the defendant or the defendant's agents failed to use due care and diligence in their

management of the trains, which injured the deceased, you can not find for the plaintiffs for an injury resulting therefrom, and your verdict will be for the defendant; and, by due care and diligence I mean the care and diligence which a man of ordinary prudence engaged in like business would exercise for his own protection.

Refused.

Instruction No. 23.

When the deceased entered the service of the defendant Company as locomotive engineer, he assumed all the risks of the occupation that were ordinarily incident to it, of which he had notice, and that were obvious and patent to him, and he will be presumed to have had notice of all such risks and hazards which, to a person of his experience and understanding are or ought to be patent and obvious.

Refused.

Instruction No. 24.

You are instructed that from the evidence it appears that the existing rules of said company, if followed would have been sufficient to have prevented the accident and the failure to promulgate other and different rules for the government of its switch engines and trains within the yard limits of Lincoln, would not constitute actionable negligence on the part of the defendant.

Refused.

32

25.

You are further instructed that in the event that you find that the defendant was guilty of negligence which was gross and that the deceased was guilty of negligence which was slight in comparison therewith, then you are instructed that in assessing the damages the damages shall be diminished by you in proportion to the amount of negligence attributable to the deceased bears to that of the defendant.

Refused.

Endorsed: 45—41. Lizzie L. Wright Admx. et al., vs. C. R. I. & P. Ry. Co.—25. Instructions requested by defendant—Clerk's Office District Court Lancaster County, Nebraska—Filed March 22, 1911. J. S. Baer, Clerk Dist. Court.

*Instructions of the Court.*

In the District Court of Lancaster County, Nebraska.

45—41.

LIZZIE L. WRIGHT and HENRY C. BERGE, Admr., Plaintiffs,  
vs.  
C., R. I. & P. Ry. Co., Defendants.

Gentlemen of the Jury:

1st. The plaintiffs for their cause of action against the defendant in their petition allege that on or about the 9th day of December, 1909, Otto O. Wright, was sent with an engine of the Defendant from Fairbury to Omaha, and while on his way the defendant through its employes carelessly and negligently ran a switch engine violently against the engine that said Otto O. Wright was running, whereby he was caught between the cab and the tender of his engine and subjected to injuries that resulted almost immediately in his death; that said collision occurred on the defendant's track and right of way near Holdrege and 19th street in the city of Lincoln at a point about 100 feet north of where the track of defendant runs underneath an overhead bridge known as the Holdrege street bridge where defendant's track makes an abrupt curve, and that about 200 feet north and east of the bridge aforesaid, and about 50 feet north of where the two engines collided the track makes an abrupt turn north and east, and said curve runs through a deep cut at said point making it impossible for an engineer going north to see an engine coming south just before said engine emerges from behind the acute portion of the cut aforesaid; that said collision and injury to said Wright occurred because of the negligence of the defendant, and said negligence was the proximate cause of said Wright's death; that at the time of going through said cut said Wright had his engine under perfect control and at the time of the injury complained of was running in strict compliance with the orders of the defendant; that the negligence of the defendant of which plaintiffs complain consisted:

(a) In the failure of defendant to promulgate suitable rules for the safety of its employes in the conduct of its business, the operation of its trains, and the management of its yards in the city of Lincoln and especially in failing to provide suitable rules for the operation in said yards, among other things providing that the switch engines are bound only to watch for first class *class* trains and passenger trains, and that all other trains need only run under control, and in not having rules providing that its switch engines within the yard limits coming around said curve should always sound its whistle or ring its bell:

(b) In the failure to give said Wright timely warning by bell or whistle of the approach of said switch engine;

(c) Because defendant's employes upon said switch engine as soon as they discovered the engine of plaintiff's intestate, jumped from their said engine without reversing the same and without trying to stop the same:

(d) In running said switch around said curve at a negligent and dangerous rate of speed without having the same under control.

That at the time of his death said Otto O. Wright was 32 years of age, and prior to said injury was in good health and able to earn and did earn \$150 per month which he devoted to the support and maintenance of his family, consisting of his wife Lizzie L. Wright, one of the plaintiffs herein; that by reason of the negligence of the defendant as hereinbefore alleged causing the death of said Otto O. Wright, said widow and said estate has been damaged in the sum of \$25,000, for which plaintiffs ask judgment?

Given.

2nd. The defendant for its amended answer to the petition of the plaintiff denies each and every allegation therein contained. For further answer, defendant alleges that the injury to plaintiff's decedent was not the result of any negligence on its part, but was due to the carelessness and gross negligence of plaintiffs' decedent said Otto O. Wright in the following particulars, to-wit: that though defendant had rules promulgated governing the operation and running of engines with which said Otto O. Wright was familiar

among other things said rules requiring the train which was  
35 being operated by said Wright to be "under full control," yet said Wright did not run his engine under full control in the yard limits of the city of Lincoln as required by said rule, and was not running said engine under full control at the time of his injury but was running his engine which was an extra, at an excessive and negligent rate of speed.

Further answering the defendant alleges that the injury complained of in plaintiffs' petition resulted from the risks incident to the employment of plaintiff's decedent, and that the dangers and risks which caused the death of said Otto O. Wright were obvious to him and he has full knowledge thereof, and defendant alleges that the plaintiff's decedent assumed said risks.

Defendant further alleges that the risks resulting from the presence of the switch engine on said track, were incident to the employment of plaintiffs' decedent, and were assumed by him, and this defendant is in no wise liable for any injury resulting on account thereof.

Given.

3rd. The plaintiffs for their reply to defendant's amended answer, deny each and every allegation contained therein.

These pleadings make up the issues which you are to try and determine by your verdict.

Given.

4th. The jury are instructed that the burden is upon the plaintiffs and it is for them to prove every material allegation contained in said petition by a preponderance of the evidence. If the jury find that the evidence bearing upon any one or more of the material

allegations of the petition is evenly balanced, or that it preponderates in favor of the defendant then the plaintiff cannot  
36 recover, and the jury should find for the defendant.

By a preponderance of the evidence is meant the weight of evidence; that which on the whole evidence when fully, fairly and impartially considered by the jury produces the stronger impression upon the mind of the jury and is more convincing as to its truth when weighed against the evidence in opposition thereto.

Given.

5th. The question as to whether the defendant was negligent in one or more of the respects as alleged in plaintiffs' petition as *as* set out in subdivisions (a) (b) (c) and (d) of the first paragraph of these instructions is one of the material elements of plaintiffs' cause of action to which the jury should direct their attention in determining upon their verdict.

Negligence may be defined as the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs, would under the circumstances do, or doing something, which a reasonable man would not do under the circumstances. In other words negligence is the absence of care according to the circumstances.

Given.

6th. If you find from the evidence and under these instructions that the defendant was negligent in one or more of the respects as set out in the subdivisions (a) (b) (c) and (d) of the first paragraph of these instructions, then you should determine from the evidence whether such negligence proximately contributed to the death of plaintiffs' intestate—in other words, was the proximate cause thereof.

37 By the term "proximate cause" as used in these instructions, is meant that which is a natural and continuous sequence unbroken by any new cause producing the event, and without which the event would not have occurred.

Given.

7th. As to the several other grounds of negligence alleged in plaintiffs' petition and to which reference was made in the opening statement, and about some of which evidence has been introduced you are now instructed to disregard them and confine your consideration in arriving at your verdict, to the specific grounds set out in subdivisions (a) (b) (c) and (d) of the first paragraph of these instructions, any evidence which may have been received, touching any of these other acts of negligence, is now withdrawn from your consideration and you will not consider such evidence except as it may apply upon said subdivisions (a) (b) (c) and (d).

Given.

8th. Touching subdivision (a) of the first paragraph of these instructions you are further instructed that it was the duty of the defendant company to exercise reasonable care to adopt and promulgate reasonable rules for the control and conduct of its business in all cases, in case its business had become sufficiently extensive

to demand their adoption in the exercise of reasonable care for the protection of its employes. In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln

Yards were reasonably sufficient for the protection of its employes at the time plaintiffs' intestate sustained his injuries.

In this connection you are further instructed that if the defendant could have foreseen that an injury to any of its servants in said curve and cut could have been avoided by the exercise of reasonable care on its part in the adoption and promulgation of a rule, then it was negligence in not adopting such rule.

Given.

9th. On the other hand where a given rule or rules of the employer, regularly adopted is violated by an employe, the effect of such violation of the rule upon the right of recovery of the injured employe, depends largely upon the question of the materiality of the violation of the rule or rules in producing the injury complained of. If the violation of the rule or rules was the proximate cause of the injury and the injured employe himself was violating the rule when injured, he is guilty of contributory negligence, as that term is hereinafter explained.

Given.

10th. You are instructed that under the rules of the company the light engine which was being run by plaintiffs' intestate as extra, was required to run and pass through the Lincoln yards "under full control." It is for you to say from the testimony what the term "under full control" means, and then to apply your interpretation to the rules of the defendant company in which the term is used and also to the acts of Otto O. Wright, in compliance with or failure to comply with such rules in determination whether his act were in compliance with or in violation of defendant's rules.

Given.

11th. If you find from the evidence, that the defendant was negligent in one or more of the particulars alleged, and as set out in the first paragraph of these instructions, and if you further find from the evidence that such negligence proximately contributed to the injury of plaintiffs' intestate, then you should direct your attention among other things to the defendant's claim that plaintiffs' intestate was negligent and also that he assumed the risks of his employment.

Given.

12th. As to the defendant's claim that plaintiffs' intestate was negligent, and that said negligence proximately contributed to his injury, you are instructed that the fact that Otto O. Wright has been guilty of contributory negligence, if you so find, does not bar a recovery herein, if you further find from the evidence that his negligence was light, and that of the defendant was gross in comparison; but you are instructed that in assessing the plaintiff's damages, if any you find, such damages shall be diminished by you in propor-

tion as the amount of negligence attributable to the said Wright bears to that of the defendant.

By gross negligence is meant the want of that care which every man of common sense however inattentive he may be, takes of his own safety; and negligence cannot be considered gross, unless evidenced by an entire failure to exercise care or by the exercise of such slight degree of care as to justify a belief that the person on whom the care was incumbent was indifferent to the welfare of others and of himself.

40 By a slight negligence is meant the omission of that vigilance which persons of ordinary prudence and foresight are accustomed to use, or it may — defined as the failure to use great care and diligence.

Given.

13th. As — the defense of contributory negligence and also as to the defense of assumption of risks, the burden of proof is upon the defendant to establish both of said defenses by a preponderance of the evidence, as to those terms have been hereinbefore defined.

Given.

14th. You are instructed that the relation existing between the defendant and Otto O. Wright at the time of the injury in question was that of master and servant.

At the time of said Wright's employment the defendant impliedly agreed to use reasonable care to provide reasonable safe places in and about which he was to be required to work, to furnish reasonably safe and suitable machinery, tools and appliances for the work to be done, and at all times during the continuance of the employment to exercise reasonable care to keep in the same safe condition the places, machinery and appliances.

The defendant was not an insurer and was not required to provide the safest possible machinery or the safest possible places but the dangers inherent to the nature of the work must not have been enhanced through the defendant's fault.

By the acceptance of the employment said Wright assumed all the risks of injury caused by the dangers incidental to the business

and by the dangers arising from the existing conditions of  
41 the places, machinery, etc., which were known or ought to have been known to said Wright at the time. No duty was imposed upon the defendant to protect said Wright against such risks, and the defendant consequently cannot be guilty of negligence in connection therewith. The risks that a master will himself be negligent is not assumed by the servant. Said Otto O. Wright, the servant, by accepting the employment, impliedly agreed to assume all risks of injury arising from the existing condition of affairs however dangerous that condition might be provided that he knew and appreciated the dangers or in the experience of reasonable care might have known and appreciated them, and if the dangers are obvious he is held to have known and appreciated them. As to such dangers the defendant owed no duty to said Wright.

Given.

15th. The laws of Nebraska, which grant the right to plaintiffs to maintain this kind of an action, restricts the recovery of damages solely to the pecuniary loss sustained by Lizzie L. Wright the widow of Otto O. Wright. The law simply provides that only such damages shall be awarded as in the impartial and considerate judgment of the jury shall be a fair and just compensation to said widow for the pecuniary or money loss sustained by the death of her husband. You may take into consideration the age of said Otto O. Wright at the time of his death, his earning capacity prior to such death, and his ability and disposition to contribute out of his earnings to his wife's support; his physical condition and his probable expectancy of life, and you will then return your verdict for such amount as will in your judgment recompense the widow for the pecuniary loss sustained by her.

42 However in the event that you find from the evidence, that said Otto O. Wright was guilty of contributory negligence which was slight, while the negligence of the defendant was gross, then in assessing plaintiffs' damages such damages shall be diminished by you in proportion as the amount of negligence attributable to Otto O. Wright bears to that of the defendant.

On the other hand should you find for the defendant you will so say by your verdict.

Given.

16th. The jury are instructed that the credibility of the witness is a question exclusively for the jury to determine. In determining the weight to be given to the testimony of the several witnesses, the jury should take into consideration their interest in the result of the suit, if any such is proved; their conduct and demeanor while testifying; their apparent fairness or bias if any such appears; their opportunities for seeing or knowing the things about which they testify; the reasonableness or unreasonableness of the story told by them, and all the evidence and facts and circumstances proved tending to corroborate or contradict such witness if any such appears.

Given.

17th. You will take these instructions, together with the blank forms of verdict prepared for you, retire to your jury room select your foreman who will sign your verdict and there from the evidence before you and the law as given you in these instructions determine upon your verdict.

Given.

LINCOLN FROST, *Judge.*

43 Endorsed: 45—41. Lizzie L. Wright and Henry C. Berge, Adm., Plaintiffs vs. C. R. I. & P. Ry. Co.—17 Instructions of the Court. Clerk's Office District Court Lancaster County, Nebraska—Filed Mar- 22, 1911. J. S. Baer, Clerk Dist. Court.

*Defendant's Exceptions to Instructions.*

In the District Court, Third Judicial District of Nebraska.

Docket 45, Page 41.

LIZZIE L. WRIGHT, Adm'x, et al., Plaintiff,  
vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO., Defendant.

Comes now the Chicago, Rock Island & Pacific Railway Co., in the above entitled cause and excepts to the giving and refusal to give instructions as follows:

To instruct- number one 1 given by the court on its own motion.

To instruct- number two 2 given by the court on its own motion.

To instruction number three 3 given by the court on its own motion.

To instruction number four 4 given by the court on its own motion.

To instruction number five 5 given by the court on its own motion.

To instruction number six 6 given by the Court on its own motion.

To instruction number seven 7 given by the court on its own motion.

To instruction number eight 8 given by the court on its own motion.

To instruction number nine 9 given by the court on its own motion.

To instruction number ten 10 given by the court on its own motion.

To instruction number eleven 11 given by the court on its own motion.

To instruction number twelve 12 given by the court on its own motion.

To instruction number thirteen 13 given by the Court on its own motion.

44 To instruction number fourteen 14 given by the Court on its own motion.

To instruction number fifteen 15 given by the court on its own motion.

To instruction number sixteen 16 given by the court on its own motion.

To instruction number seventeen 17 given by the court on its own motion.

To the refusal to give instruction number 1 requested by defendant.

To the refusal to give instruction number 2 requested by defendant.

To the refusal to give instruction number 3 requested by defendant.

To the refusal to give instruction number 4 requested by defendant.

To the refusal to give instruction number 5 requested by defendant.

To the refusal to give instruction number 6 requested by defendant.

To the refusal to give instruction number 7 requested by defendant.

To the refusal to give instruction number 8 requested by defendant.

To the refusal to give instruction number 9 requested by defendant.

To the refusal to give instruction number 10 requested by defendant.

To the refusal to give instruction number 11 requested by defendant.

To the refusal to give instruction number 12 requested by defendant.

To the refusal to give instruction number 13, 14, 15, requested by the defendant.

To the refusal to give instruction numbered 16-17-18 requested by the defendant.

To the refusal to give instruction number 19, 20, 21, requested by defendant.

22 & 23 & 24, 25 all requested by defendant.

THE CHICAGO, ROCK ISLAND &  
PACIFIC RAILWAY CO.,

By E. P. HOLMES &

G. L. DE LACY, *Att'ys for Def't.*

Exceptions taken and allowed at the time.

LINCOLN FROST, *Judge.*

45      Endorsed: Doc. 45, Page 41, Defendant's Exceptions to Instructions. Lizzie L. Wright, Adm'x, et al., Plaintiffs, vs. The Chicago Rock Island & Pacific Railway Co., Defendant—Clerk's Office District Court, Lancaster County, Nebraska—Filed Mar. 22, 1911. J. S. Baer, Clerk Dist. Court.

*Journal Entry.*

That on the 22nd day of March A. D. 1911 (that being the 50th Judicial day of the January A. D. 1911 term of said Court) were had and done the following proceedings as appear upon Court Journal "58" at page 182 to-wit:

45—41.

LIZZIE L. WRIGHT et al.

vs.

CHICAGO, ROCK ISLAND &amp; PACIFIC RAILWAY COMPANY.

Now on this day comes the parties hereto with their attorneys and also comes the jury heretofore impaneled and sworn herein according to law, and the trial of this cause proceeded, and after hearing the remaining testimony of witnesses adduced, the argument of counsel and the charge of the court, the said jury retired to their room in charge of the Sheriff to determine upon their verdict, and by agreement of the parties hereto, are instructed to return a sealed verdict herein tomorrow morning at nine thirty o'clock, in case of agreement.

46

*Journal Entry.*

That on the 23rd day of March, A. D. 1911 (that being the 51st Judicial day of the January A. D. 1911 term of said Court), were had and done the following proceedings as appear upon the Court Journal "58," page 184, to-wit:

45—41.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the  
Estate of Otto O. Wright, Deceased,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corpora-  
tion.

Now come the parties hereto with their attorneys and also comes the jury heretofore impaneled and sworn herein according to law, with their sealed verdict in writing signed by their foreman and say:

January Term, A. D. 1911, to wit, March 22, 1911.

"THE STATE OF NEBRASKA,  
Lancaster County, ss:

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the  
Estate of Otto O. Wright, Deceased, Plaintiffs,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corpora-  
tion, Defendant.

47

We, the Jury, impaneled and sworn in the above entitled cause, do find for the plaintiffs and assess the amount of their damages against the defendant at the sum of \$25,000.00.

C. M. HERRICK, *Foreman.*"

It is therefore considered and adjudged by the Court that in accordance with the verdict of the Jury, the said plaintiffs Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, deceased, do have and recover of and from the said defendant, Chicago, Rock Island and Pacific Railway Company, a Corporation, the said sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars, with interest thereon at the rate of 7% per annum from this date until paid, together with the amount of their costs herein expended, taxed at \$—, for which execution is hereby awarded.

*Defendant's Motion for a New Trial.*

In the District Court of Lancaster County, Nebraska.

45—41.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the Estate of Otto O. Wright, Deceased, Plaintiffs,

VS.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Comes now the defendant, The Chicago, Rock Island and Pacific Railway Company, and moves the court to set aside the verdict heretofore returned by the jury on the 23rd day of March, 48 A. D. 1911, and for a new trial of this cause, for the following reasons, towit:

1.

The verdict is not sustained by sufficient evidence.

2.

The verdict is contrary to the weight of the evidence.

3.

The verdict is contrary to law.

4.

Errors of law occurring at the trial, duly excepted to by the defendant.

5.

The Court erred in overruling the defendant's motion to direct a verdict in favor of the defendant, and against the plaintiffs, at the conclusion of the plaintiffs' case.

6.

The Court erred in refusing to admit evidence on behalf of the defendant, and the offer thereof duly excepted to.

7.

The Court erred in overruling the defendant's motion to direct a verdict in favor of the defendant and against the plaintiffs at the conclusion of the trial of said cause, for the reason therein given, to which the defendant duly excepted.

8.

The Court erred in refusing to give to the jury instruction No. 1, requested by the defendant, to which the defendant duly excepted.

49

9.

The Court erred in refusing to give to the jury instruction No. 2, requested by the defendant, to which the defendant duly excepted.

10.

The Court erred in refusing to give to the jury instruction No. 3, requested by the defendant, to which the defendant duly excepted.

11.

The Court erred in refusing to give to the jury instruction No. 4, requested by the defendant, to which the defendant duly excepted.

12.

The Court erred in refusing to give to the jury instruction No. 5, requested by the defendant, to which the defendant duly excepted.

13.

The Court erred in refusing to give to the jury instruction No. 6, requested by the defendant, to which the defendant duly excepted.

14.

The Court erred in refusing to give *the* the jury instruction No. 7, requested by the defendant, to which the defendant duly excepted.

15.

The Court erred in refusing to give to the jury instruction No. 8, requested by the defendant, to which the defendant duly excepted.

16.

The Court erred in refusing to give to the jury instruction No. 9, requested by the defendant, to which the defendant duly excepted.

50

17.

The Court erred in refusing to give to the jury instruction No. 10, requested by the defendant, to which the defendant duly excepted.

18.

The Court erred in refusing to give to the jury instruction No. 11, requested by the defendant, to which the defendant duly excepted.

19.

The Court erred in refusing to give to the jury instruction No. 12, requested by the defendant, to which the defendant duly excepted.

20.

The Court erred in refusing to give to the jury instruction No. 13, requested by the defendant, to which the defendant duly excepted.

21.

The Court erred in refusing to give to the jury instruction No. 14, requested by the defendant, to which the defendant duly excepted.

22.

The Court erred in refusing to give to the jury instruction No. 15, requested by the defendant, to which the defendant duly excepted.

23.

The Court erred in refusing to give to the jury instruction No. 16, requested by the defendant, to which the defendant duly excepted.

51

24.

The Court erred in refusing to give to the jury instruction No. 17, requested by the defendant, to which the defendant duly excepted.

25.

The Court erred in refusing to give to the jury instruction No. 18, requested by the defendant, to which the defendant duly excepted.

26.

The Court erred in refusing to give to the jury instruction No. 19, requested by the defendant, to which the defendant duly excepted.

27.

The Court erred in refusing to give to the jury instruction No. 20, requested by the defendant, to which the defendant duly excepted.

28.

The Court erred in refusing to give to the jury instruction No. 21, requested by the defendant, to which the defendant duly excepted.

29.

The Court erred in refusing to give to the jury instruction No. 22, requested by the defendant, to which the defendant duly excepted.

30.

The Court erred in refusing to give to the jury instruction No. 23, requested by the defendant, to which the defendant duly excepted.

52

31.

The Court erred in refusing to give to the jury instruction No. 24, requested by the defendant, to which the defendant duly excepted.

32.

The Court erred in refusing to give to the jury instruction No. 25, requested by the defendant, to which the defendant duly excepted.

33.

The Court erred in giving to the jury instruction No. 1, given upon the Court's own motion, to which the defendant duly excepted.

34.

The Court erred in giving to the jury instruction No. 2, given upon the Court's own motion, to which the defendant duly excepted.

35.

The Court erred in giving to the jury instruction No. 3, given upon the Court's own motion, to which the defendant duly excepted.

36.

The Court erred in giving to the jury instruction No. 4, given upon the Court's own motion, to which the defendant duly excepted.

37.

The Court erred in giving to the jury instruction No. 5, given upon the Court's own motion, to which the defendant duly excepted.

38.

The Court erred in giving to the jury instruction No. 6, given upon the Court's own motion, to which the defendant duly excepted.

39.

The Court erred in giving to the jury instruction No. 7, given upon the Court's own motion, to which the defendant duly excepted.

53

40.

The Court erred in giving to the jury instruction No. 8, given upon the Court's own motion, to which the defendant duly excepted.

41.

The Court erred in giving to the jury instruction No. 9, given upon the Court's own motion, to which the defendant duly excepted.

42.

The Court erred in giving to the jury instruction No. 10, given upon the Court's own motion, to which the defendant duly excepted.

43.

The Court erred in giving to the jury instruction No. 11, given upon the Court's own motion, to which the defendant duly excepted.

44.

The Court erred in giving to the jury instruction No. 12, given upon the Court's own motion, to which the defendant duly excepted.

45.

The Court erred in giving to the jury instruction No. 13, given upon the Court's own motion, to which the defendant duly excepted.

46.

The Court erred in giving to the jury instruction No. 14, given upon the Court's own motion, to which the defendant duly excepted.

47.

The Court erred in giving to the jury instruction No. 15, given upon the Court's own motion, to which the defendant duly excepted.

48.

The Court erred in giving to the jury instruction No. 16, given upon the Court's own motion, to which the defendant duly excepted.

54

49.

The Court erred in giving to the jury instruction No. 17, given upon the Court's own motion, to which the defendant duly excepted.

50.

The Court erred in directing a verdict for the plaintiffs in the 15th paragraph of its instructions.

51.

The damages are excessive, and were given under the influence of passion and prejudice.

52.

The Court erred in refusing the request for instruction No. 5, requested by defendant, in reference to accidents happening at the place complained of in this case, to which the defendant duly excepted.

53.

The Court erred in submitting paragraphs (a), (b), (c) and (d) of the first instruction, submitting to the jury the several acts of negligence therein set forth, for the reason that there was no evidence offered to the jury in support thereof.

Respectfully submitted,

THE CHICAGO, ROCK ISLAND AND PACIFIC  
RAILWAY COMPANY, *Defendant*,

By E. P. HOLMES &

G. L. DE LACY,

*Its Attorneys.*

Endorsed: 45—41. In the District Court of Lancaster County, Nebraska. Lizzie L. Wright and Henry C. Berge, Administrators of the Estate of Otto O. Wright, Deceased, Plaintiffs, vs. The Chicago, Rock Island and Pacific Railway Company, Incorporated, Defendant. Defendant's Motion for a New Trial. Clerk's Office, District Court, Lancaster County Nebraska. Filed Mar. 24, 1911. J. S. Baer, Clerk Dist. Court.

55

### *Journal Entry.*

That on the 18th day of May A. D. 1911 (that being the 27th Judicial day of the April A. D. 1911 term of said Court) were had and done the following proceedings as appear upon Court Journal "58" at page 317 to-wit:

45—41.

LIZZIE L. WRIGHT et al.

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY

This cause now comes on to be heard upon the motion of the defendant to set aside the verdict of the jury heretofore returned and entered herein and the judgment rendered thereon, and for a new trial of this cause, and is submitted to the Court on due consideration whereof, it is by the Court ordered that if plaintiffs herein within ten days from this date file a remittitur of \$10,000.00 from the verdict heretofore rendered herein, letting the said verdict

21

stand for \$15,000.00, then the said motion for a new trial is overruled, otherwise the said motion is sustained, to all of which each party hereto severally excepts, and hereby are each allowed forty days from the adjournment of this term of Court to reduce exceptions to writing.

*Remittitur.*

In the District Court of Lancaster County, Nebraska.

45—41.

LIZZIE L. WRIGHT et al., Plaintiffs,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

56 Come now the plaintiffs in the above action and hereby remit from the verdict and judgment in the above entitled cause the sum of ten thousand Dollars (\$10,000) from the verdict and judgment rendered herein, letting said verdict stand for the sum of Fifteen Thousand Dollars (\$15,000) in compliance with the condition imposed by the Court in its order overruling the motion for a new trial, but plaintiffs except to such ruling of the court.

LIZZIE L. WRIGHT ET AL., Plaintiff,

By G. W. BERGE, *Their Attorney.*

Endorsed: 45—41. Lizzie L. Wright et al., Plaintiff, vs. Chicago, Rock Island & Pacific Railway Company a corporation Defendant—Remittitur—Clerk's Office District Court Lancaster County, Nebraska—Filed May 25, 1911. J. S. Baer, Clerk Dist. Court.

*Bond.*

In the District Court of Lancaster County, Nebraska.

45—41.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the Estate of Otto O. Wright, Deceased, Plaintiffs,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Incorporated, Defendant.

57 Know all men by these presents:

That we, The Chicago, Rock Island and Pacific Railway Company incorporated, as principal and the United States Fidelity & Guaranty Co. of Baltimore as surety, are held and firmly bound unto Lizzie L. Wright, and Henry C. Berge, Administrators of the estate of Otto O. Wright, deceased, in the penal sum of Thirty one

Thousand (\$31,000.00) Dollars, for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors and assigns.

Dated this 27th day of May, A. D. 1911.

Whereas, on the 23rd day of March A. D. 1911, a judgment was rendered in the District Court of Lancaster County, Nebraska, in favor of plaintiffs and against the defendant, for the sum of Twenty five Thousand — (\$25,000.00) in an action pending therein wherein Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, deceased, were plaintiffs, and The Chicago, Rock Island and Pacific Railway Company, incorporated was defendant—

And Whereas, on the 25th day of May A. D. 1911 pursuant to the order of Court, the plaintiffs filed a remittitur for the sum of Ten Thousand Dollars, and said judgment in favor of plaintiffs and against the defendant stands for the sum of Fifteen Thousand (\$15,000.00) Dollars and costs, and said defendant The Chicago Rock Island and Pacific Railway Company incorporated intends to appeal said cause to the Supreme Court to obtain a review of said proceedings whereby said judgment was obtained.

Now therefore, the condition of this obligation is such that if said defendant, The Chicago, Rock Island and Pacific Railway Company incorporated, shall prosecute such appeal without 58 delay, and pay all condemnation money, interest and costs which may be found against it on the final determination of the cause in the Supreme Court, then this obligation shall be null and void, otherwise to remain in full force and effect.

THE CHICAGO, ROCK ISLAND AND PACIFIC  
RAILWAY COMPANY, INCORPORATED,

By E. P. HOLMES, *Attorney,*  
*Principal.*

[SEAL.] THE UNITED STATES FIDELITY & GUAR-  
ANTY CO.,

By O. W. PALM, *Attorney in Fact,*  
*Surety.*

AGUSTA BA EGL, As to Surety.

Approve the foregoing Bond and surety thereon this 27th day of May A. D. 1911.

[SEAL.]

J. S. BAER,

*Clerk Dist. Court,*  
By THEO. H. BERG, *Deputy.*

Endorsed: 45—41. In the District Court of Lancaster County, Nebraska—Lizzie L. Wright and Henry C. Berge, Administrators of the estate of Otto O. Wright, Deceased, Plaintiffs vs. The Chicago Rock Island and Pacific Railway Company, incorporated, Defendant—Bond—Clerk's Office District Court Lancaster County, Nebraska—Filed May 27, 1911. J. S. Baer, Clerk Dist. Court.

59

*Journal Entry.*

That on the 8th day of April A. D. 1911 (that being the 65th Judicial day of the January A. D. 1911 term of said Court) were had and done the following proceedings as appear upon Court Journal "58" at page 232 to-wit:

It is hereby ordered that all causes, matters and motions now pending in this court and not otherwise disposed of, be and the same are hereby continued until the next term of this court.

This January term of this district Court was begun on the 23rd day of January A. D. 1911, and continued from day to day and from time to time by regular adjournment until this 8th day of April A. D. 1911 and is now adjourned without day.

60

*Certificate.*

STATE OF NEBRASHA,

*Lancaster County, ss:*

I, J. S. Baer, Clerk District Court Third Judicial District of Nebraska in and for the County of Lancaster do hereby certify that the above and foregoing is a true and correct copy of Petition, Amended Answer, Reply, 25 Instructions of Defendant,—17 Instructions of Court—Defendant's Exceptions to Instructions—Motion for New Trial—Remittitur and Bond with all endorsements on each Proceeding of trial—Judgment—Ruling on Motion for New Trial and Adjournment Sine Die of our said Court in a cause therein wherein Lizzie L. Wright et al. are plaintiffs and Chicago Rock Island and Pacific Railway Company is defendant as the same appears fully upon the records and files of said Court and now in my charge remaining as Clerk aforesaid.

I further certify that the Bill of Exceptions hereto attached is the original Bill of Exceptions filed in my office in the above entitled action.

Witness my hand and seal of said Court at Lincoln this 6 day of June A. D. 1911.

[SEAL.]

J. S. BAER, *Clerk D. C.*,By W. C. BURCHAM, *Deputy.*

Trans. Fees \$14.50 pd. by E. P. Holmes.

Endorsed: 17189—Wright v. C. R. I. & P. R. Co.—Transcript—Supreme Court of Nebraska—Filed June 6 1911. H. C. Lindsay, Clerk.

61

And on the 6th day of June, there was filed in the office of the clerk of said supreme court, a certain Præcipe, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

LIZZIE L. WRIGHT and HENRY C. BERGE, Pl'ffs,

v.

C., R. I. & P. Ry. Co., D'f't's.

*Præcipe.*

To the Clerk of said Court:

Please docket the enclosed transcript of record as an appeal from a judgment rendered on the 22nd day of March 1911, in a certain cause in the District Court of Lancaster county, wherein Lizzie L. Wright is Plaintiff, and C. R. I. & P. Ry. Co. is Defendant, and wherein said plaintiff recovered a judgment against the defendant for \$25,000; the motion for a new trial was ruled on May 18/1911, said motion was overruled if plaintiff within ten days filed a remittitur of \$10,000, said remittitur filed May 25/1911.

You will designate the above named defendant Chicago, Rock Island & Pacific Ry. Co. as Appellant, and Lizzie L. Wright and Henry C. Berge as Appellees.

Issue notice of appeal for above named Appellee.

E. P. HOLMES,

GEO. L. DE LACY,

*Attorneys for Appellant.*

[Endorsed:] General No. 17189. Supreme Court State of Nebraska. Lizzie L. Wright v. C. R. I. & P. Ry. Co. Præcipe. Supreme Court of Nebraska. Filed June 6 1911. H. C. Lindsay, Clerk.

62 And on the same day there was filed in the office of the clerk of said Supreme Court, a certain Bill of Exceptions, in the words and figures following, to-wit:

WRIGHT

v.

C., R. I. &amp; P. Ry. Co.

*Bill of Exceptions.*

Supreme Court of Nebraska. Filed Jun- 6, 1911. H. C. Lindsay,  
Clerk.

LIZZIE L. WRIGHT and HENRY C. BERGE, Adm., Plaintiffs,

vs.

C., R. I. &amp; P. Ry. Co., Defendant.

*Defendant's Bill of Exceptions.*

Clerk's Office, District Court, Lancaster County, Nebraska. Filed  
Jun- 6, 1911. J. S. Baer, Clerk Dist. Court.

I, J. S. Baer, clerk of the district court of Lancaster county, within  
the third judicial district of Nebraska, do hereby certify that this is  
the original bill of exceptions filed in the office of said clerk in said  
cause.

In testimony whereof, I hereunto set my hand, and affix the offi-  
cial seal of said court, this 6 day of June, 1911.

[SEAL.]

J. S. BAER, *Clerk District Court,*By W. C. BURCHAM, *Deputy.*

Received of defendant, for examination and amendment, a draft  
of a bill of exceptions in the following case of Lizzie L. Wright and  
Henry C. Berge, Adm., plaintiffs, vs. C. R. I. & P. Ry. Co., defend-  
ant, tried in the district court of Lancaster County, at the January  
1911 term.

G. W. BERGE,

*Attorney for Plaintiff.*

Dated May 27 1911.

I herewith return the draft of the bill of exceptions in the case of  
Lizzie L. Wright & Henry C. Berge Adm., plaintiffs, vs. C. R. I. &  
P. Ry. Co., Defendant, submitted on the 27th day of May 1911,  
and propose amendments thereto as follows: None.

G. W. BERGE,

*Attorney for Plaintiff.*

Dated June 1 1911.

67 In the District Court of Lancaster County, Nebraska.

45—41.

LIZZIE L. WRIGHT and HENRY C. BERGE, Adm., Plaintiffs,  
vs.  
C., R. I. & P. RY. Co., Defendant.

*Defendant's Bill of Exceptions.*

Be it remembered that on the trial of this cause in the district court of Lancaster County, Nebraska, before Honorable Lincoln Frost, one of the judges of said court, and a jury, at the January, 1911, term thereof, to-wit: on the 14th, 15th, 16th, 17th, 20th, 21st, and 22nd days of March, 1911, the following evidence and testimony was introduced, and given to the court and jury, by the plaintiff and in her behalf and by the defendant and in its behalf, together with the objections of the said parties to the introduction thereof. the rulings of the court thereon, and the exceptions of the said parties thereto by them respectively noted, as hereinafter set forth.

Appearances: Mr. George W. Berge, appearing as attorney for plaintiff, and Mr. E. P. Holmes and Mr. G. L. De Lacy, appearing as attorneys for defendant.

68 9:30 A. M. Wednesday, Mar. 15, 1911.

Court met pursuant to adjournment, and the following proceedings were had and done.

(During the argument of Mr. Berge to the Jury he stated as follows:)

I expect to show that before Mr. Wright got killed there, there had been other collisions there.

Mr. Holmes: We except to the remarks and statement of counsel for the reason that it is incompetent, immaterial, irrelevant, and prejudicial to the interests of the defendant.

Mr. Berge: I will state it again.

Mr. Holmes: The defendant objects as incompetent, immaterial, irrelevant, and prejudicial to the interests of this defendant company; such evidence would not be allowed to be shown.

Mr. Berge: Let me make a statement. I want to put in the record that I expect to show what I have said, your Honor, that when other accidents have occurred before, it is notice to the defendant that this is a dangerous place, and they must take some precautionary measure to make the place as reasonably safe as reasonable care can make.

Court: Let us not get into that now, Mr. Berge.

Mr. Berge: All right, I will present it when I come to my evidence.

69 Mr. Berge: I expect to show that it is negligence not to take some precautionary measure, some gong, or something.

Mr. Holmes: The defendant objects to the statement as

incompetent, immaterial, irrelevant, and for the further reason that such defects, if any, were risks assumed by the decedent.

Overruled.

The defendant excepts.

W. S. SCOTT, being produced and duly sworn on behalf of the plaintiff testified as follows:

Examined by Mr. Berge for plaintiff:

1 Q. Where do you live?

A. #330 South 18th street.

2 Q. Your name is W. S. Scott?

Mr. Holmes: The defendant objects to the introduction of any evidence for the reason that the petition fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant Company.

Overruled.

The defendant excepts.

A. Yes sir.

3 Q. It is hard for the jury to hear, Mr. Scott; talk a little loud.

A. All right.

4 Q. What official position do you hold in this County?

A. County Surveyor.

5 Q. How long have you been County Surveyor?

A. About twenty years.

6 Q. Twenty years?

70 A. Yes sir.

7 Q. Followed that occupation continuously?

A. Yes sir.

Map identified as Exhibit "1."

8 Q. Mr. Scott, I hand you Exhibit #1, so marked by the Reporter, and will ask you to say who made that?

A. I made it.

9 Q. How can I tell from the Exhibit which is north and which is south, east and west?

A. Well, the three lines on east marked "27th. street" run in a north and south direction.

10 Q. And on which side of the Exhibit?

A. On the right hand side of the Exhibit.

11 Q. Or the east side?

A. Or the east side; yes sir.

12 Q. Now, what is there to indicate the north side of it?

A. Well, a line with the letters "C. R. I. & P. R. R. Transfer Track" are at the north side of the map.

13 Q. Of the Exhibit?

A. Of the Exhibit.

14 Q. That "C. R. I. & P. R. R. Transfer Track," runs which way?

A. East and west.

15 Q. Is there anything on the south end of the Exhibit which will indicate the direction?

A. Well, there is a dotted line, a brown line, with the words "Vine Street" printed on here at the south end; south side of Exhibit "1."

16 Q. And which way does Vine street run?

A. East and west.

71 17 Q. Now, I notice commencing at the south side of the Exhibit, south end of it, running northward, a little northeasterly, and then a sharp curve to the right,—I mean a little northwesterly, and then a sharp curve to the right running a northeasterly direction and on which is written "C. R. I. & P. R. R.," what is that track on the exhibit?

A. That represents the location of the Chicago, Rock Island & Pacific Railroad.

18 Q. And the roadbed of it?

A. Supposed to be the center of the track.

19 Q. Now, how far south on the exhibit does this show the Chicago, Rock Island & Pacific Railroad track?

A. South as far as Vine street.

20 Q. Does that go south far enough to the depot,—it don't reach the depot, does it?

A. No, sir.

21 Q. How far north of "O" street is Vine street?

A. Half a mile.

22 Q. You may state whether, Mr. Scott, whether the distance in the letters from "O" to "V"—

A. Well, not exactly that, but "O" street is a section line, and Vine street is a half section line.

23 Q. "O" street, and then "P," "Q," "R," "S," "T," "U," "V"; now is Vine street on "V" street, where "V" street would be?

A. Well, not at the same distance; the blocks would not be the same size as they are from "O" to "U" street, but it is just a half a mile from "O" street to "Vine" street.

24 Q. And this exhibit commences at Vine street showing the territory northward, does it?

A. Yes; north for one mile.

72 25 Q. State whether this exhibit shows the place where the Rock Island track goes through under the Holdrege street viaduct?

A. It does.

26 Q. How is it indicated on the exhibit?

A. Holdrege street is indicated by the words "Holdrege Street," in three parallel lines, and the viaduct is indicated "viaduct," and the approaches indicated by the words "dirt fill" on the west. The parallel lines running east and west, and the two diagonal lines crossing each other at the crossing of the line, represents the center of the track. And the words "dirt fill" on the east of that, and another, "16 plus 98" center of viaduct.

27 Q. Now, I will ask you where you have got the two parallel

lines and then the cross in the center, does that represent the opening in the viaduct?

A. Yes sir.

28 Q. Now, how far does it show the Rock Island track northward and northeastward, this exhibit?

A. Well, it shows to a point about three hundred feet east of 27th. street at the junction of the main line, and the C. R. I. & P. R. R. transfer track.

29 Q. In other words it shows the Rock Island track beyond the place where the Rock Island crosses 27th. street?

A. East of it.

30 Q. I mean east, beyond it, yes?

A. Yes sir.

31 Q. I notice immediately south and east, if that is a correct designation of the line, where you have printed C. R. I. & P. R. R. Co., there is a line along that, what does that mean, that

73 line here? (Indicating.)

A. That represents the south line of the right-of-way.

32 Q. Now the line immediately north of the line that you have said was the center of the track, what does that line represent?

A. That represents the north line of the right-of-way.

33 Q. Now, still further south there there is a line there—a double line—and a check line on which is printed "C. & N-W. R. R.," what does that mean?

A. That is the line of the Chicago & North Western Railroad.

34 Q. For a way there it runs practically parallel with the Rock Island?

A. Almost, yes.

35 Q. And you go still further north and west I find another double line, and check line, which is written "C. B. & Q. R. R.," what is that?

A. That is C. B. & Q. Railroad.

36 Q. Mr. Scott, while I have you here, where is the Fair Grounds with respect to that Holdrege Street viaduct?

A. North.

37 Q. Is this up in here the Fair Grounds? (Indicating.)

A. Yes, sir.

38 Q. The large square in a northwestern direction from the viaduct, practically taking that entire square in the corner, is that the Fair Grounds?

A. The Fair Grounds is in that quarter.

39 Q. Now, we will take here, where you have written "Holdrege Street" there is a line on the north of it. and south of it, what is that?

A. They represent the north and south boundaries of Holdrege Street.

74 40 Q. Then the word "Holdrege" street, and the line, is the center of the street?

A. Yes sir.

41 Q. Is that true of 27th. street?

A. Yes sir.

42 Q. What is the line at the north end of the exhibit, of the C. R. I. & P. R. R. transfer track, what is that?

A. That represents the half section line.

43 Q. Now, down pretty near to the south side of the exhibit, or nearly to Vine street, there is a double line check running practically straight east and west, what is that?

A. The Missouri Pacific Railway.

44 Q. The Missouri Pacific?

A. Yes sir.

45 Q. There is another check line along here upon which you have written O. L. & B. Ry., what is that?

A. The Omaha, Lincoln & Beatrice Railway.

46 Q. Is that what is called the "Interurban"?

A. The Interurban, yes sir.

47 Q. I notice you have 18th. street here; is that where 18th. street is located?

A. Yes sir.

48 Q. Here south of the viaduct, and north of the Missouri Pacific about in the center you have written C. R. I. & P. R. R., what is that?

A. That tract of land bounded by these lines is owned by the Chicago, Rock Island & Pacific Railway.

49 Q. That whole square in there?

A. Yes sir.

50 Q. Mr. Scott, you have written over here: "No platted ground east of that owned by the C. R. I. & P. R. R.," what do you mean by that?

A. Well, I mean that that ground in there is platted into lots.

51 Q. From here you have written "5" with a little circle over the five, and then two naughts and the apostrophe and a "C" after it, what is that?

A. That means five degrees; the "5" and the small circle indicates five degrees, and the two circles, the two naughts and the one little mark indicates "minutes."

52 Q. Five degrees and no minutes, is that it?

A. Yes sir.

53 Q. Under the five degrees I notice you have written "60" with a circle after, and "42" with the apostrophe or comma over it, what does that mean?

A. 60 degrees and 42 minutes.

54 Q. What was you going to say?

A. 60 degrees and 42 minutes is the central angle of that curve.

55 Q. Now, Mr. Scott, take the C. R. I. & P. R. R. track there you have testified to, commencing on Vine street running north. and northwesterly, and north and northeasterly, in a northeasterly direction until the full curve has been made, have you indicated on this exhibit the exact curve there, as the Rock Island runs out there?

A. Yes sir.

56 Q. And that five degrees and no minutes, what relation has that to anything on that exhibit?

A. That relates to the degree of curve.

57 Q. Five degrees and no minutes relates to the degree of curve where?

76 A. Well, to the degree of curve of the railroad.

58 Q. The whole curve taken together?

A. Yes sir.

59 Q. What does "60 degrees and 42 minutes" mean there?

A. Well, that is the central angle of the curve, meaning the angle between the two straight lines at their intersection, if produced.

60 Q. Now, let me ask you, Mr. Scott, we will take the first one and extend it. I don't believe I get a clear idea yet; take the "five degrees, C," now it is written over there quite a ways from the track, but it has to do with the curve, does it?

A. Yes sir.

61 Q. Will you explain outside of the map there what is meant by a five degree curve; do I say "five degree curve" or five degree C curve?

A. Five degree curve.

62 Q. Explain to the jury what you mean by that?

A. That means that the length of 100 feet on the arc of that circle would subtend an angle of five degrees at the center.

63 Q. Now, that is surveyors' phraseology, but it takes surveyors to understand it. Suppose you illustrate it without giving it in engineer's language; suppose the curve would not be so much, would it be more or less than five?

A. Less.

64 Q. Suppose it was more acute still?

A. Then it would be more than five.

65 Q. What is the standard you start from?

A. A one degree curve.

77 66 Q. And what would a one degree curve be; a very acute curve, or not much of a curve?

The defendant objects as immaterial and incompetent. Overruled. The defendant excepts.

A. A one degree curve would be a very slight curve, that is it would have a radius of 5,730 feet, practically.

67 Q. But what degree can a curve be made, suppose it is an entire circle what would the degree of the curve be?

The defendant objects as incompetent, immaterial and irrelevant. Overruled. The defendant excepts.

A. Be made any degree; depends on the size of the circle; the smaller the circle the sharper the degree of curve.

68 Q. The smaller the circle the sharper the degree?

A. Yes sir.

69 Q. May it extend to a hundred degrees?

A. Yes sir.

70 Q. That would be a very small circle?

A. Yes sir.

71 Q. And this is what you call a five degree curve?

A. Yes sir.

72 Q. Now you have run across about where the curve starts at the north side, a line which seems to be at straight right angles, upon which you have written "21 plus 68.9, pt," what do you mean by that?

A. Well, that "pt" means the point of tangent, that means the straight line leaving the curve, the "21 plus 68.9" is the distance from the crossing of the Missouri Pacific to the Rock Island railroad.

In starting my measurements I started at the Missouri Pacific railway and called that "zero", and then this distance marked on the map, such as "9 plus 50.3, P. C." and "21 plus 68.9 pt", they mean that many feet, or hundredths of feet and fractions. The "plus" is the fraction of hundredth's of feet from the point of beginning.

73 Q. The point of beginning was where?

A. The Missouri Pacific, the intersection, the center of the Missouri Pacific and Rock Island railroads.

74 Q. What relation has that 60 degrees and 42 minutes now to the Rock Island track?

A. That is the angle between what we call the two tangents.

75 Q. What do you mean by "tangent"?

A. The two straight lines.

76 Q. The two straight lines you mean?

A. Beginning at the Missouri Pacific Railroad and running to the point called "P. C." and the straight line from near 27th. street running southwesterly to the point called "pt"; now those two lines are called a tangent; and the 60 degrees and 42 minutes means the angle if those two lines were produced to the intersection; the 60 degrees and 42 minutes would be the angle between this line and this line, or these two lines being at right angle to the tangents, the same line is subtended in here, if those were produced to the intersection. (Indicating.)

The defendant objects to this evidence for the reason that the jury cannot understand it.

A. (continued). The "P. C." is the beginning of the curve, and the "pt" is the end of the curve.

77 Q. The tangent you have spoken of is where you have written "9" plus "5-OC", "P. C." and "21" plus "68.9 P. C."?

A. Those are the ends of the tangent.

79 78 Q. Where are the tangents?

A. The tangents are the straight lines; these. (Indicating.)

79 Q. The straight lines on which that is written?

A. No sir; the lines representing the center of the track.

80 Q. Now, Mr. Scott, we will take the Rock Island track itself from Vine street northward past 27th. street, and we will take what is called the Interurban, Missouri Pacific, the Holdrege street, and Holdrege Street bridge, Northwestern track, C. B. & Q. track, and the accident curve, and all that—all that is shown on that map, is it an accurate map of the conditions out there as they are?

A. Yes sir.

81 Q. Are the distances between the Missouri Pacific track and the Holdrege street the proper distances?

A. Yes sir.

82 Q. I mean relatively with respect to other distances on the exhibit?

A. Yes sir.

83 Q. And the extent of the curve as it actually is out there is shown on the exhibit here, is it?

A. Yes sir.

Mr. Berge: The plaintiff offers in evidence the Exhibit "1".

Mr. Holmes: I would like to cross examine a little bit first.

Examined by Mr. Holmes:

84 Q. Have you marked on that map the number of feet from the Missouri Pacific track to the viaduct?

A. Yes sir.

80 85 Q. How many feet?

A. 1,698 feet.

86 Q. Have you marked the distance from the viaduct around the curve, any distance at all?

A. To the end of the curve, you mean?

87 Q. Yes sir?

A. Well, that is the difference between 2,168.9 and 1,698.

88 Q. Have you attempted to show upon your map the distance one can see in going around that curve in the engine?

A. No sir.

89 Q. Going either way?

A. No sir.

90 Q. You don't know?

A. Yes; I don't know about the engine part of it.

91 Q. You can't tell how far a person on an engine can see either way?

Mr. Berge: You mean from the exhibit?

92 Q. You can't tell by this exhibit how far a person on an engine can see either way coming around that curve?

A. No sir.

93 Q. Does that map show the distance from the viaduct to the 27th. street?

A. No sir; only I was getting it from the scale; the scale of the map is 200 feet to the inch.

94 Q. The three lines upon the east on that map show 27th. street?

A. Yes sir.

95 Q. Is there anything on that map that indicates the yard limit of the Rock Island on the east?

A. No sir.

96 Q. Do you know where the yard limit is?

81 A. No sir.

97 Q. You do not?

A. No sir.

98 Q. When was that map made?

A. Well, it was made just a day or two ago.

99 Q. You made that personally yourself?

A. I made the original drawing; this is a——

100 Q. Did you make the survey personally?

A. Yes sir. I can give you the exact date of it if you want it.

101 Q. Now give me the height of the viaduct?

A. This does not show the height.

102 Q. Does it show the width?

A. Yes sir.

103 Q. What is the width?

A. Well, it does not give it in feet on here.

104 Q. So that the map does not show the width of the viaduct?

A. Only by scaling it.

105 Q. Does that map, Mr. Scott, show the foundations for the viaduct?

A. No sir.

106 Q. Does that map show the height of the embankment upon each side of the viaduct?

A. No sir.

107 Q. Do you know by an actual survey what the height of the embankment is?

The plaintiff objects as not proper cross examination, nothing about this exhibit. Sustained. The defendant excepts.

108 Q. Does that map show, Mr. Scott, the width of the cut at the viaduct?

A. Through which the cut runs, you mean?

109 Q. Yes sir?

A. No sir.

110 Q. Does that map show, Mr. Scott, the depth of the cut at the viaduct?

A. No sir.

111 Q. Nor any place either before or after you pass the viaduct?

A. No sir.

Mr. Holmes: The defendant Company objects to the introduction of exhibit "1" for the reason that it is incompetent, immaterial, irrelevant, serves no purpose before this jury, and no sufficient foundation having been laid for the introduction of the same.

Mr. Berge: Let the record show it is offered to show the general situation.

Court: I will overrule the objection. The defendant excepts.

Exhibit "1", map, received in evidence, attached hereto at end of the Bill of Exceptions.

(Smaller map identified as Exhibit "2".)

Direct examination resumed.

Examined by Mr. Berge for plaintiff.

112 Q. I now hand you Exhibit "2", Mr. Scott; I will ask you who made that?

A. I did.

113 Q. How am I to know, or the jury, or Judge Holmes here, which is the north of it and which is south?

82 A. Well, the upper side of the paper represents the north.

114 Q. How do you know when you have got it up?

A. Well, from the printing on the map.

115 Q. And the lower part would be what?

A. Towards the south.

116 Q. And a person holding it with the upper part north the right side would be what?

A. Would be the east.

117 Q. And the left side?

A. The west.

118 Q. And the lower side the south?

A. Yes sir.

119 Q. Now, Mr. Scott, I notice the first two drawings on there by sections, you have got a lot of checks, little squares, beginning at the north one have you got a scale on this exhibit to indicate what that is, what it means?

A. Yes sir.

120 Q. When and where and how; what is it?

A. The scale on the north, or upper diagram, is one inch equals ten feet,—that is a cross section of the cut.

121 Q. One inch equals ten feet?

A. Yes sir.

122 Q. You mean an inch on this exhibit?

A. Yes sir.

123 Q. Now the larger squares are they an inch, supposed to be?

A. Yes; the larger squares, marked by the heavy lines, are an inch, or ten feet, and the small squares represent one foot.

124 Q. Now have you got that scale written under the top of the drawing?

84 A. Yes sir.

125 Q. What have you got the little squares in there for?

A. They each represent one foot.

126 Q. Then the drawing on the top of exhibit "2", if I understand you, the heavy lines, are ten feet square?

A. Yes sir.

127 Q. And the little squares are one foot square?

A. Yes sir.

128 Q. Now, Mr. Scott, in this drawing I find you have got a line drawn through it, first downward, beginning at the left, in a diagonal way, and then eastward, and then up on the other side again, what is that drawing in this top there?

A. That represents a cross section of the cut.

129 Q. At what place?

A. At about 200 feet north of the viaduct.

130 Q. Well, a cross section, we will take the center of that drawing, is that where the track is?

A. Yes sir.

131 Q. And what is this on the side?

A. These sloping lines are the slope of the banks on the cut.

132 Q. State whether that shows the depth of the cut at that place?

A. It does.

133 Q. And you say that is how far north of the viaduct?

A. About 200 feet.

134 Q. Is it shown under this drawing where this drawing is supposed to represent it?

A. Yes sir.

135 Q. What is the reading under it?

A. "Cross section of cut, 200 feet north of viaduct, showing barn and outbuildings east of cut; scale one inch equals ten feet".

85 136 Q. Now, Mr. Scott, you may state whether you observed the lay of the land, the topography of the country between this point represented by this drawing, 200 feet north of the viaduct and southward up to the viaduct; how about the lay of the land on the east side of the railroad track there as compared to the drawing that you have here?

A. It is about the same, but it would be a little bit lower, the ground on the east would be a little bit lower as you approached the viaduct than at that point as shown on this drawing.

137 Q. You say the barn and out-buildings, are they shown there and properly related to the track as to where they are?

A. Yes; the barn and out-buildings are shown in outline at their relative position to the railroad track.

138 Q. Does it show the bottom where the barn is built, the foundation of it?

A. Yes sir.

139 Q. And upwards?

A. Yes sir.

140 Q. Does it show where the barn and out-buildings are with respect to the place 200 feet north of the viaduct?

A. Yes sir.

141 Q. Well, it shows immediately east, does it?

A. Yes sir.

142 Q. Now, Mr. Scott, taking this top drawing is there anyway to indicate it different from the other?

A. Well, the top of the drawing.

143 Q. How can the jury or any of us tell where the roadbed itself is in there?

A. Well, the railroad itself is marked by the letters "C.

86 R. I. & P. R. R."

144 Q. But running at what seems to be at right angle with it, or north and south?

A. Yes; they are on the upper side of this irregular line.

145 Q. Now, then, Mr. Scott, from this exhibit, we will take the bottom where the track lays on the ground, and going eastward, will this exhibit show, in going eastward straight?

A. At right angles?

146 Q. Yes; at right angles how far it is before you strike the embankment?

A. Yes sir.

147 Q. By counting the little squares?

A. Yes sir.

148 Q. Suppose we go up to the level of the embankment on each side, and going eastward at right angle, will this show how many feet it is until we reach the top of the embankment?

A. Yes sir.

149 Q. How, by doing what?

A. By counting the little squares.

150 Q. Now, relatively speaking, Mr. Scott, from the place where this drawing is made, and southward towards the viaduct, you may tell the jury whether the cut, and elevation, and the distance of the cut from the track itself, is about the same?

A. Yes; it is just about the same.

151 Q. What do you call this drawing? (Indicating.)

A. A cross section.

152 Q. Have you any cross section north of this 200 feet north of the viaduct?

A. No sir.

87 153 Q. Is that drawing about which I have just examined you correct in all respects?

A. Yes sir.

154 Q. Showing the place of the track itself and the elevation, and the embankment on each side, and the distances from it, etc.?

A. Yes sir.

155 Q. And the relation to it of the building and out-buildings there, correctly in every way?

A. Yes sir.

156 Q. Now, we will take the second drawing downward from the top on this exhibit, you may state in a general way what that represents or is supposed to show?

A. That represents a section.

By Mr. Holmes:

157 Q. A cross section?

A. A cross section of the Holdrege street viaduct, and the approaches.

158 Q. Looking at it from——

A. Looking at it from the south.

159 Q. That is to say, if you were standing on the Rock Island track south of the viaduct and looking at it you would see something like that?

A. Yes sir.

160 Q. Now, in that cross section does it appear where the Rock Island track is itself?

A. Yes sir.

161 Q. And it is shown by what?

A. By the letters "C. R. I. & P. R. R."

162 Q. But the heavy track is not there, is it?

88 A. Well, th's isn't it. Now on this second,—or the next to the top of the drawing,—the track itself is represented by the little marks there that are some resemblance to a rail, and marked C. R. I. & P. R. R.

163 Q. That is in the second cross section?

A. Right in here. (Indicating.)

164 Q. Now, then, Mr. Scott, this second drawing, is that drawn on the same scale, and does it appear on the Exhibit?

A. Yes sir.

165 Q. What is the scale?

A. The vertical scale is ten feet to the inch; the horizontal scale is twenty feet to the inch.

166 Q. Now, is that written on the exhibit so it can be told by examining the exhibit?

A. Yes sir.

167 Q. Where is it written?

A. Just below the drawing.

168 Q. Now you may state what you have written there to indicate it?

A. Have written: "Section through Holdrege street viaduct on line AAA scale, one inch equals ten feet vertical. Scale one inch equals twenty feet horizontal."

169 Q. Vertical is upward, and horizontal sideways?

A. Yes sir.

170 Q. Then in counting the sections upwards we have every little section represents how many feet?

A. One foot.

171 Q. And the large square represents how many feet?

A. Ten feet.

172 Q. And going the other way how much does a large square represent?

89 A. Large squares represent twenty feet, and the small squares represent two feet.

173 Q. From an examination then on this Exhibit "2" can you tell, taking the build of the railroad track underneath the viaduct itself, can you calculate the number of feet?

A. Yes sir.

174 Q. Can you calculate the opening through under the viaduct there from this exhibit, the second drawing?

A. Yes sir.

175 Q. It is not given on the Exhibit in number of feet except as you can calculate it?

A. No sir; it is not given in feet.

176 Q. Does this exhibit, this drawing we are talking about now, does that show the opening under the viaduct as far as the dirt is filled, or what does it represent, these slanting lines?

A. Those sloping lines show the edge of the embankment next to the railroad track.

177 Q. Then the sloping lines each side show east of it and west of it, is solid dirt, is it, of the slanting lines?

A. Yes sir.

178 Q. This drawing that I am talking about now, does that show the posts or pillars on each side of the right of way going through under that viaduct?

A. Yes sir.

179 Q. How do they appear?

A. They are not very plain on here, but they are shown by these lines drawn down from this little square,—the little square pieces, drawn on this map, indicate what are called the “caps,” and then from this extending downward you can see parallel lines that  
90 are not drawn exactly on those little foot squares, and they represent the piles or posts.

180 Q. This shows the top of the posts against the viaduct, and underneath where they are supposed to stop in the ground?

A. To their intersection with the ground, or where they are supposed to be in the ground.

181 Q. Now we will take it on the west side of the railroad track under the viaduct, does it appear how near they are to the center of the track, can you calculate it from these little squares?

A. Yes sir.

182 Q. And are those posts or pillars, those supports in the proper places shown on the exhibit?

A. Yes sir.

183 Q. And the general outline here, the slanting on top, what is that?

A. That shows the surface of the fill, and the surface of the viaduct, and the fence on the south side going over the top of the fill, and the top of the viaduct.

184 Q. Are all of those things that you have indicated on this drawing shown properly relatively to all other things on the drawing?

A. I think on that one particular drawing, yes sir.

185 Q. That is what I mean, that is what I have asked about. Now we will take the third one downward, including all of these lines in the center, the ink lines—the ink lines, there seem to be four on the exhibit; take the third one from the top down, what is that?

A. That shows the plans of the viaduct and the approaches with the floor of the viaduct supposed to be removed in order to  
91 show the arrangements of the piling or posts.

186 Q. If a man was in an air ship right over the viaduct, with the floor off that is about the way it would look, is it?

A. Yes sir.

187 Q. A bird's eye view of it on top, sitting right over it?

A. Yes sir.

188 Q. These little things are posts you would see looking down?

A. Yes sir.

189 Q. And see the track underneath; and the east and west side of where the posts come?

A. This is the embankment, or fill. (Indicating.)

190 Q. Where those circles are supposed to be posts, is that open except the posts?

A. Yes sir; with the exception of the embankment as shown up in the drawing above.

191 Q. Well, now, you may state whether you take the third drawing here from the top down where those little circles are sup-

posed to be the posts, whether that is the same as the openings in the drawing above?

A. The accident you mean?

192 Q. Yes; what place?

A. Yes, it is the same place.

193 Q. Now these circles around here (indicating), is that the embankment?

A. Yes sir.

194 Q. Now are these drawings correct in every respect, or this particular drawing as shown here? (Indicating.)

A. Yes sir.

195 Q. Is there a scale on it indicating so we can figure the distance?

92 A. Yes sir.

196 Q. Where?

A. Below.

197 Q. Read it?

A. "Scale one inch equals twenty feet."

198 Q. One inch equals twenty feet and it doesn't matter which way you measure it?

A. No.

199 Q. Is this drawing correct in all respects?

A. Yes sir.

200 Q. Now, we will take the last drawing, or at the bottom of the exhibit, what is that?

A. That is a cross section of the track and the ground for one hundred feet wide at the south end of the curve.

201 Q. How far south of the viaduct?

A. 1800 and—where is that other map, let us see. (Witness refers to other map and figures on a paper.) What I started to say there I do not want to say that because that is not right.

202 Q. How far south of the viaduct is that drawing taken?

A. 747.7 feet.

203 Q. South of the viaduct?

A. Yes; along the track.

204 Q. Now does that drawing show the center of the track?

A. Yes sir.

205 Q. And how is it indicated on the drawing?

A. By the letters "C. R. I. & P. R. R."

206 Q. At the center of the track?

A. Yes sir.

93 207 Q. Now, what is the line drawn, what seems to be east and west, sort of in a meandering fashion up and down through that drawing; does that represent the elevation of the land there?

A. Yes sir.

208 Q. Well does it appear that the track itself is worn, the surrounding country there?

A. Yes sir.

209 Q. Does it give, or can you calculate the number of feet?

A. Yes sir.

210 Q. How?

A. By counting the squares.

211 Q. And is there a scale to that drawing?

A. Yes sir.

212 Q. And is it written there?

A. It is.

213 Q. Where?

A. Below.

214 Q. Read it.

A. "Scale one inch equals ten feet."

215 Q. And is that the way you can tell the elevation of the track above the surrounding country there?

A. Yes sir.

216 Q. Now, Mr. Scott, from the place where that cross section is taken that is what; that is about a cross section?

A. Yes sir.

217 Q. Northward up to the viaduct you may tell the jury whether you observed the lay of the land there on each side of the track, and how it lays with respect to the track on each side; is it the same as this cross section, or different? If so, explain.

94 A. Well, it is about the same as this cross section up to the south side of the embankment, although on the east the high ground approaches a little nearer the track than at this point.

218 Q. Now, does this drawing we have been talking about, the lower one on Exhibit "2," did you draw that yourself?

A. Yes sir.

219 Q. It is correct in all respects?

A. Yes sir.

220 Q. It shows itself with your explanation?

A. Yes sir.

Mr. Berge: The plaintiff offers in evidence Exhibit "2," being map.

Examined as to admissability of Exhibit "2."

Examined by Mr. Holmes for defendant.

221 Q. In the third section of your map, of Exhibit "2," is that a correct location of the track on the Rock Island as it goes under the viaduct?

A. Yes sir.

222 Q. And does that tell how far from the north side of the viaduct to the end of your lines it is?

A. No; only by scaling.

223 Q. Can you scale that and tell just how many feet the curve commences?

A. Well, that is only a portion of the entire curve.

224 Q. Does any of your exhibit show the continuation of this curve?

A. Yes sir.

95 225 Q. Where?

A. In Exhibit number "1."

226 Q. Now can you point out on Exhibit "1" where your lines end on Exhibit "2"?

A. That would be very close to the north edge of what is represented as the viaduct?

227 Q. Then that is at a point where the curve is most abrupt, isn't it?

Mr. Berge: The plaintiff objects as calling for the opinion and conclusion of the witness.

Sustained. The defendant excepts.

228 Q. Now can you point out in this third section on your map, Exhibit "2," where the ends of these lines are on Exhibit "1"?

A. Point out on Exhibit "1"?

229 Q. Where the end- of those lines are in the third section of your map?

A. They are very close to the upper side, or north side of these lines representing the viaduct, within twenty feet, I should say.

230 Q. You mean to say that the end of the lines on Exhibit "2" are at or about the point under the viaduct there?

A. Well, it might be twenty feet north, fifteen or twenty feet to the north of it.

231 Q. To the north?

A. To the north of it, yes sir.

232 Q. Now calling your attention to the fourth section of Exhibit "2," I will ask you where is the basis that you have to arrive at the location of that track running through that cross section?

A. Well, you mean how I obtained—

233 Q. Yes; where is your starting point; where did you get the basis?

96 A. My starting point is at the center of the track at the beginning of the curve.

234 Q. This merely shows a cross section of that track?

A. Yes sir.

235 Q. At the beginning of the curve?

A. At the south end of it.

236 Q. At the south end of the curve. Now will you point out on Exhibit that place?

A. It is marked "9 plus 50.3 P. C."

237 Q. And how many feet is that from the viaduct?

A. 747.7.

238 Q. And where is that mark on your map?

A. It is not marked on the map only by taking the difference.

239 Q. That is what you were figuring?

A. Between the spaces given.

Direct examination resumed.

Examined by Mr. Berge for plaintiff:

240 Q. How can you obtain the distances?

A. It says on the drawing "16 plus 98 center of viaduct," with a little arrow pointing indicating the center of the viaduct, the

center of the track. And this distance "9 plus 50.3 P. C." is what we call stationing that point, and the difference between the two is the point.

241 Q. What do you mean "9 plus 50.3"?

A. 950.3 feet; the "9" means "hundreds" of feet, and the "plus" means the fraction of a hundred.

242 Q. Then if you subtract you say 1698 from "28" plus,—

97 A. Yes, the "9" gives the distance from the center of the viaduct to the north and east end of the curve?

243 Q. Then if you subtract 9 plus 50, it should read 50 feet, and that is 1698?

A. Yes sir.

244 Q. Should read it in number of feet as though the "plus" was not in there?

A. Yes sir.

Cross-examined as to competency.

Examined by Mr. Holmes for defendant:

245 Q. Now, Mr. Scott, the upper cross section of Exhibit "1" was taken where, as shown upon Exhibit "1"?

A. At a point about two hundred feet north of the viaduct, at this point shown where it is marked "barn."

246 Q. Now on the cross section, Exhibit "1," how far is that barn from the top of the embankment on the east?

A. About eleven feet.

247 Q. And does that appear upon Exhibit "1"?

A. The edge of the embankment doesn't show, but the distance from the center of the track, the relative distance, is shown on this plan.

248 Q. What is the south line of the three lines shown as the Rock Island & Pacific Railroad, what is that?

A. That is supposed to be the south line of their right of way.

249 Q. How far does this map, Exhibit "1," show their barn to be south of their right of way?

A. Well—

250 Q. You have got it marked there, haven't you?

98 A. Not the difference, no; that distance is 1900—1900 feet from the beginning where the barn is located.

251 Q. That doesn't show how many feet the barn is?

A. No sir.

252 Q. Does this cross section on Exhibit "2" show the height of the embankment at the location of that barn?

A. Yes sir.

253 Q. How high does that show that?

A. You mean above the track?

254 Q. Yes sir.

A. 10.2 feet.

By Mr. Berge:

255 Q. Above what?

A. Above the track. Here is another explanation here. This heavy line here I call "zero," then the top of the embankment is "plus 1," that is one foot above, to the top of the ground; at the edge of the fill is "plus 11.2," so the difference between this "plus 1" and "plus 11.2" would be the difference in elevation between the top of the embankment and the top of the edge of the cut.

256 Q. The second section on Exhibit "2" it is a cross section of the track immediately under the viaduct?

A. At the south it shows on the line "AA."

257 Q. Does that show on Exhibit "1"?

A. No sir; this contains section "2" of the Holdrege street viaduct on line "AAA." Here are the two A's, they were not put on, they were on here; they should be on. That shows it is on that line that this cross section is taken. That is at the south edge of the south row of piling across the viaduct.

Mr. Holmes: The defendant Company objects to the introduction of Exhibit "2" for the reason it is incompetent, immaterial, irrelevant, not within the issues of this law suit, and no sufficient foundation having been laid for the introduction of the same.

Overruled. The defendant excepts. Exhibit "1" received in evidence, and attached hereto and made a part of this bill of exceptions, and found at end of the Bill of Exceptions.

258 Q. Mr. Scott, you have already testified that the elevation between the viaduct and northward up to the cross section, especially on the east side, the lay of the land there generally is the same as it is at the cross section as I understood you?

A. Generally, except that it slopes a little towards the south as it approaches the ground; the ground as you approach the viaduct is not quite so high as it is at this cross section.

259 Q. That is, the natural lay of the ground?

A. Yes sir.

260 Q. State whether it is filled up there at the viaduct?

A. At the viaduct it is filled, yes sir.

261 Q. How many feet did you say that was north of the viaduct, that cross section on the north side?

A. About 200 feet.

262 Q. Now, commencing at that point and still going northward and northeastward can you tell how far it is until the track gets absolutely straight; could you tell by examination of these exhibits?

A. Yes sir.

263 Q. How far?

100 A. How far from what point?

264 Q. From the point of that cross section on the north side of the viaduct?

A. About 270 feet.

265 Q. 270?

A. Yes sir.

266 Q. Now, we will go over on the north side of the viaduct and

pay no attention to your cross section, and go northward and northeastward, and how far does the curve extend until it strikes an absolutely straight track?

A. 471 feet.

267 Q. 471 feet?

A. Yes sir.

268 Q. Now, Mr. Scott, southward from the viaduct how far south do you go, in which there is a curve in the track, until it is straight?

A. 747.7 feet.

269 Q. 747.7 feet?

A. Yes sir.

270 Q. Now, then, Mr. Scott, commencing at the south end where the curve begins shortly after you cross the Missouri Pacific tracks going northward at the point where the curve begins northward, past the viaduct until the track becomes absolutely straight, how far is the whole distance of the curve?

A. The length of the curve you mean?

271 Q. Yes?

A. 1218.6 feet.

272 Q. Now, Mr. Scott, we will take the cross section on the north side of the viaduct and go northward, or northeastward, 101 whatever the direction may be there, and on the east side of the railroad track, and speaking of the embankment there you may tell the jury whether you observed the embankment northward until the track gets straight, on the east side of the track?

A. You mean from this cross section? (Indicating.)

273 Q. Yes sir?

A. North and east up to the point where the track is straight?

274 Q. Yes?

A. Yes sir; I did.

275 Q. You may tell the jury about that embankment at that place from the cross section northward, or northeastward, on the east side of the track, as compared with the embankment south of the cross section?

A. Well, the embankment north and east of the cross section is about the same as at the cross section.

276 Q. That is, as far northward and eastward until the track gets straight?

A. Yes sir.

277 Q. You are speaking now as to the height of it?

A. The height of it.

278 Q. Now, you may tell the jury about the distance of the embankment from the center of the right-of-way to the railway track north of the cross section as compared to the embankment south of the cross section relatively to the track, how it compares?

A. Well, it is about the same distance all the way.

279 Q. Then, Mr. Scott, is it a fact that the distance of the embankment east of the track, commencing at the viaduct on the north side until the track gets straight going northward, is about 102 the same in distance away?

A. Yes sir.

280 Q. About the same in height?

A. Yes; about, yes.

281 Q. Now from the place of the curve south, where you say it started on the south side of the viaduct, and northward to where the track gets straight, tell whether the curve is about the same at that point, or whether it is more acute one place or another?

A. It is the same all the way around.

282 Q. The same curve the whole distance?

A. Yes sir.

283 Q. Mr. Scott, you may state whether on either Exhibit "1" or Exhibit "2" at the north of the viaduct, whether you have indicated a place where there is now a semaphore on the exhibit?

A. Yes sir.

Mr. Holmes: The defendant objects as incompetent, immaterial, irrelevant, and as seeking to show a subsequent act on the part of the railroad, and not to show the conditions that existed at the time of this accident.

Mr. Berge: Let the record show I will withdraw this question at the present time.

(Addressing Mr. Scott:) Mr. Scott, will you be in the city the next three or four days?

(Witness Scott:) Why, I don't want to be; I won't unless I have to, I know that; only in the evenings.

Mr. Berge: Let the last question stand. I will withdraw my withdrawal for the present, in as much as the witness says he doesn't want to be here, and has business elsewhere, and as a part  
103 of my question I want it to appear that I simply ask it now for the purpose of showing where it is, and for no other purpose, on this exhibit at the present. Let it be received for no other purpose except to locate this semaphore on the exhibit, strip it of everything else except his indication on the exhibit.

Mr. Berge: The authorities say that I can show not only that other accidents occurred there, but that they have since that time put a semaphore at that place where I contend one should have been.

Mr. Holmes: I except to the statement.

Sustained. The plaintiff excepts.

Mr. Berge: I offer to show by the witness who is now on the stand where the defendant railroad since this injury has occurred, has placed a semaphore to prevent accidents and injuries to its employees such as killed Mr. Wright, and I offer to show just where it is on Exhibit "1", relatively, with all other points and places on that exhibit.

Mr. Holmes: The defendant objects as incompetent, immaterial, irrelevant, and not within the issues of this law suit, and seeking to show subsequent conditions, and not the exact conditions that existed at the time of the injury complained of.

Sustained. The plaintiff excepts.

284 Q. Does Exhibit "1" locate a semaphore south of the viaduct?

Mr. Holmes: The defendant objects as incompetent, immaterial, irrelevant, and as seeking to show a subsequent act on the part of

the railroad, and not to show the conditions that existed  
104 at the time of this accident.

Sustained. The plaintiff excepts.

Mr. Berge: I offer to show by the witness who is now on the stand that Exhibit "1" does locate the semaphore south of the viaduct, and offer to show where the defendant railroad since the injury has occurred has placed a semaphore to prevent accidents and injuries to its employees such as killed Mr. Wright; I offer to show just where it is on Exhibit "1" relatively with all other points and places on that exhibit.

Mr. Holmes: The defendant objects as incompetent, immaterial, irrelevant, and as seeking to show a subsequent act on the part of the railroad, and not to show the conditions that existed at the time of this accident.

Sustained. The plaintiff excepts.

Court: Of course, this exhibit ought not to be received unless it shows the location at the time of the accident.

285 Q. Mr. Scott, how long have you lived in Lincoln?

A. About forty years.

286 Q. Did you live here when the Rock Island road was constructed?

A. Yes sir.

287 Q. When was the Rock Island road constructed?

A. That part of it was constructed in 1892.

288 Q. 1892?

A. Yes sir.

289 Q. And have you been a frequent traveler over the viaduct, and around out there in that part of the city?

A. Yes sir.

105 290 Q. Mr. Scott, the conditions out there with respect to the viaduct itself, and the Rock Island road, and the embankment, etc., the last couple of years were the same as they are now?

A. So far as I know they are.

291 Q. You have not observed any difference?

A. No.

292 Q. The Rock Island track never has been changed, its location?

A. No sir.

293 Q. And when was that viaduct built?

A. I don't know exactly, about the time the road was built, I think.

294 Q. Well, it was there December, 1909, was it?

A. Yes sir.

295 Q. And the Missouri Pacific track was there December, 1909?

A. Yes sir.

296 Q. The Interurban?

A. Yes sir.

297 Q. 27th. street and the Northwestern and the C. B. & Q. tracks and all that?

A. Yes sir.

298 Q. And, Mr. Scott, the conditions out there in December,

1909, so far as what you have shown on that exhibit, were they then as now?

A. So far as I know they are, yes sir.

299 Q. Well, you don't know of any difference?

A. No sir.

Cross-examination.

Examined by Mr. Holmes for defendant:

106 300 Q. Those same conditions as appear on your map have existed since 1892, unless it was the building of the viaduct subsequently?

A. Well, and the building of the Interurban.

301 Q. Yes, and the building of the Interurban?

A. Yes; otherwise the conditions as shown here with relation to the location of the track are as they were at that time.

302 Q. Mr. Scott, in the making of that map you seek to show the conditions as existing in December, 1909?

A. Well, I didn't do the work in December, 1909.

303 Q. Those conditions have existed then since 1892 with the exception of the viaduct, perhaps, and the Interurban?

A. Yes sir; so far as I know.

Witness excused.

107 GEORGE DEFORD, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for plaintiff:

304 Q. Where do you live?

A. #227 South 18th.

(Pictures identified as Exhibits "3," "4," "5," "6," "7," and "8.")

305 Q. Your name is what?

A. DeFord.

306 Q. What is your first name?

A. George.

307 Q. Mr. George DeFord, what is your occupation?

A. Photographer.

308 Q. And how long have you been a photographer?

A. About fourteen years.

309 Q. You understand the art and science of photography, I suppose?

A. Fairly well, yes sir.

310 Q. What is it, an art, or science, or both?

A. Why, an art, I believe.

311 Q. I will hand you Exhibit "3" and will ask you to examine it and state whether you made that?

A. Yes sir.

312 Q. You have written here "1680" feet south of viaduct looking north," is that what it is?

A. Yes sir.

313 Q. That is standing that many feet south of the viaduct and looking north towards it?

A. Yes sir.

314 Q. Is that a correct photograph of it?

108 A. Yes sir.

Mr. Berge: The plaintiff offers in evidence photograph marked Exhibit "3."

Cross-examined as to competency.

Examined by Mr. Holmes for defendant:

315 Q. Mr. De Ford, where is this point south?

A. That is where the first tracks cross. I am not certain what tracks they are, but it is the first railroad tracks that cross the Rock Island at the south.

316 Q. And the second track is the Interurban?

A. The Interurban, I think; I am not positive.

317 Q. Here is the wires?

A. The first tracks I came to.

318 Q. And this south track is the Missouri Pacific?

A. Yes sir.

(Exhibit "3" received in evidence without objection, attached hereto at end of bill of exceptions, and made a part hereof.)

Direct examination resumed.

Examined by Mr. Berge for plaintiff:

319 Q. I hand you Exhibit "4"; did you take that also?

A. Yes sir.

320 Q. Where did you stand when you took that?

A. 510 feet south of the viaduct.

321 Q. Which way.

A. Looking north.

109 Mr. Berge: The plaintiff offers in evidence photograph marked Exhibit "4."

Exhibit "4" received in evidence without objection, attached to end of Bill of Exceptions, and made a part hereof.

322 Q. I will hand you Exhibit "5" and ask you to state whether you made that also?

A. Yes sir.

323 Q. Where did you stand when you took that?

A. 176 feet north of the viaduct looking south.

324 Q. Have you written on there so you can tell?

A. Yes sir.

325 Q. You have written on "176 feet north of viaduct looking south?"

A. Yes sir.

326 Q. That is a correct picture of it, is it?

A. Yes sir.

Mr. Berge: The plaintiff offers in evidence photograph marked Exhibit "5."

Exhibit "5" received in evidence without objection, attached to end of Bill of Exceptions, and made a part hereof.

327 Q. I now hand you Exhibit "6," state whether you made that.

A. Yes sir.

328 Q. Where did you stand when you took it?

A. 420 feet north of the viaduct, looking south.

Mr. Berge: The plaintiff offers in evidence photograph marked Exhibit "6."

110 Exhibit "6" received in evidence without objection, attached to end of Bill of Exceptions, and made a part hereof.

By Mr. Holmes:

329 Q. When did you make this picture?

A. About three weeks ago.

By Mr. Holmes:

330 Q. And did you make the measurements yourself?

A. Yes sir.

By Mr. Holmes:

331 Q. What with?

A. We used a tape on the rail first; they were thirty feet, all of the rails were that length, I understood, but we measured them to be sure and then we counted the rails down.

By Mr. Holmes:

332 Q. So this number of feet is fairly accurate?

A. Yes sir.

333 Q. I hand you Exhibit "7," where did you stand when you took that?

A. 210 feet north of the viaduct looking south.

334 Q. North of the viaduct looking south?

A. Just a moment; that is not right. Number "2" I have here, I have it here 210 feet north of viaduct looking north.

335 Q. That is, you stationed yourself 210 feet north of the viaduct and then looked north some more?

A. Yes sir.

336 Q. And that is the picture of it?

A. Yes sir.

337 Q. I hand you Exhibit "8" where did you stand when you took that?

A. Directly under the viaduct.

338 Q. Looking which way?

A. North.

339 Q. On which rail?

A. On the right hand side, the east rail.

111 340 Q. Do you remember where you placed your camera, whether on the rail, or center of the track?

A. The camera was directly over the east rail.

By Mr. Holmes:

341 Q. At the north edge of the viaduct?

342 Q. That is, if this was the viaduct here (indicating), you stood north?

A. I was directly under the north edge of the viaduct, yes sir.

By Mr. Holmes:

343 Q. Does this show any part of the viaduct?

A. No sir.

Mr. Berge: The plaintiff offers in evidence photographs marked Exhibits "7" and "8."

Exhibits "7" and "8" received in evidence without objection, attached to end of bill of exceptions, and made a part hereof.

344 Q. You stood under, on the east rail, north of the viaduct?

A. Exactly under the north side of the viaduct.

345 Q. Looking northward?

A. Looking northward.

Witness excused.

It being now 12:05 the court took an adjournment until 2 o'clock P. M. same day, March 15, 1911.

112

2 O'clock P. M., March 15, 1911.

Court met pursuant to adjournment, and the following proceedings were had and done.

V. A. MATTHEWS, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for plaintiff:

346 Q. Where do you live?

A. # 435 South 13th.

347 Q. Your name is V. A. Matthews?

A. Yes sir.

348 Q. What official position do you hold?

A. Coroner.

349 Q. Of what?

A. Lancaster County, Nebraska.

350 Q. How long have you held that position?

A. Three years, a little over.

351 Q. You may state whether you were Coroner on the 8th day of December, 1909?

A. Yes sir; I was.

352 Q. Did you know Otto Wright in his lifetime?

A. I did not.

353 Q. When did you see him first?

A. December 9th, I think, in the night some time, I don't remember just what time it was; if I recall correctly it was during the night

some time of December 9th, 1909.

354 Q. After he was dead?

A. Yes sir.

113 355 Q. And where?

A. At our morgue, — no, at St. Elizabeth's hospital.

356 Q. At St. Elizabeth's hospital?

A. Yes sir.

357 Q. After you had been called there as Coroner?

A. Yes sir.

358 Q. And he was then removed to your morgue?

A. Yes sir.

359 Q. Now, you say at night on the 9th, was that following the day of the 9th do you think?

A. Yes; if I remember correctly.

360 Q. That is during the night following the 9th of December?

A. I would not be positive of that, but I think that is right.

361 Q. Now you took possession of the body?

A. I did.

362 Q. And his clothes?

A. Yes sir.

363 Q. And did you find any papers on his body, his person, or in his clothes?

Mr. Holmes: The defendant objects as immaterial and irrelevant. Overruled. The defendant excepts.

A. I did.

364 Q. Have you those with you?

A. I have.

365 Q. You were subpoenaed to bring them with you?

A. I was.

366 Q. I wish you would produce them, Mr. Matthews?

Witness produces papers. Time table identified as Exhibit "9."

114 367 Q. I hand you Exhibit "9" and ask you to state whether that is one of the papers you found on his person?

A. It is. Mr. Berge, I have made this "Otto W.," and it should be "Otto," can I correct that now, or let it go?

368 Q. Mr. Matthews, I notice on the top of Exhibit "9" there is some longhand writing, I did not observe that before. I will ask you now whose writing that is?

A. It is mine.

369 Q. And when did you write that on there?

A. At the time; December 9th or 10th, 1909.

370 Q. When you took it from his person?

A. Yes; at the time I took it from the clothing.

371 Q. And you state to me now, I don't think the reporter got it, that you wanted to make a correction about the writing?

A. I mean I have it "Otto W." instead of "O."

372 Q. But that writing was not on there when you found it?

A. No sir; I put it on there myself.

Clearance card identified as Exhibit "10," and two others as Exhibits "11" and "12."

373 Q. I hand you now, Mr. Matthews, Exhibits "10," "11," and "12" and ask you to examine them and tell the jury where you got those?

A. I got them out of Mr. Wright's pockets, or the pockets of his clothing at the same time that I got the time table.

374 Q. That was when you as Coroner took his body and his clothes?

A. Yes; when I took charge of him.

Clearance card identified as Exhibit "13" and two others as Exhibits "14" and "15."

375 Q. Mr. Matthews, I now hand you Exhibits "13," "14" and "15" and will ask you to examine them and state where you got those?

A. At the same place where I got the others, and at the same time.

Clearance card identified as Exhibit "16" and two orders as Exhibits "17" and "18."

376 Q. Now, I hand you Exhibits "16," "17" and "18"; state where you got those?

A. At the same place, and the same time as the others, out of the pockets of the clothing of Mr. Wright.

377 Q. And Mr. Matthews since that time where have those orders and clearance cards been, those Exhibits?

Mr. Holmes: The defendant objects to this form of question. If he asks where the papers have been I don't object.

378 Q. Where have those papers been, those exhibits you have just testified to?

A. Among the records in my office.

379 Q. In your possession?

A. Yes sir.

380 Q. Are those the same that you took from his clothes as Coroner when you took possession of the body?

A. They are.

381 Q. Mr. Matthews, I hand you Exhibit- "10," "11," and "12" now, and will ask you to look at them again and ask you to state whether they bear your identification marks made at the Coroner's inquest?

A. Not mine, but of the reporter who took the proceedings of the inquest; but I know his mark and can identify it.

382 Q. You know it is his mark?

A. Yes sir.

383 Q. That is on those Exhibits, is it?

A. Yes sir.

116 384 Q. Now Exhibits "16," "17" and "18" is it true as to those also?

Mr. Berge: I will withdraw that question for a moment and ask you to examine "13," "14" and "15."

385 Q. That is the Reporter's identification on those?

A. It is, on all three of them.

386 Q. Now I hand you Exhibit "18"; do you find it there?

A. Yes; Exhibit "A," "18."

387 Q. Now "16" and "17," do you find the identification marks?

A. No; but I think I can explain it.

388 Q. Explain it?

A. That when those orders and clearance——

Mr. Holmes: The defendant objects as wholly immaterial; he has testified that he found those papers on Mr. Wright's body; that is all there is to it. I don't care whether he identified it or not.

389 Q. They were found on his person?

A. Yes sir.

Witness excused.

117 WILLIAM CHARLES CAVANAGH, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for plaintiff:

390 Q. Mr. Cavanagh, state your full name?

A. William Charles Cavanagh.

391 Q. Where do you live, Mr. Cavanagh?

A. 808 Sixth street, Fairbury, Nebraska.

392 Q. How long have you lived there?

A. Seven years last Thanksgiving.

393 Q. And what is your business there, Mr. Cavanagh?

A. Chief train dispatcher.

394 Q. What road?

A. Chicago, Rock Island & Pacific.

395 Q. State whether you were Chief train dispatcher December 8, 1909, at Fairbury?

A. I was.

396 Q. Now, what is the part of your Division, or how does it go? Were there three divisions, subdivisions, the time table shows them?

A. I think 9, 10, 11 and 12; four of them are on here.

397 Q. What was your subdivision?

A. All of them.

398 Q. You were chief train dispatcher?

A. Yes sir.

399 Q. And when you say "all of them" does it include the whole system, or in the State?

A. On these subdivisions between Phillipsburg, Kansas, and Council Bluffs, or Albright, and between Horton and Nelson.

400 Q. Did that include the territory, or run, from Fairbury to Albright?

118 A. Yes sir.

401 Q. When you say chief train dispatcher you have subordinates in the office, or assistants?

A. Yes sir.

402 Q. Tell the jury, Mr. Cavanagh, how the orders of the chief train dispatcher are transmitted, or how they are gotten to the engineer, whether they get them direct from you, or the operators?

A. Through the trick dispatcher the orders are given.

403 Q. By what?

A. The trick dispatcher.

404 Q. "Trick"?

A. Yes sir; that is what we call them.

405 Q. You have such a dispatcher at Fairbury?

A. We have six of them.

406 Q. You have those operators, what we call operators?

A. No sir, entirely—the operators at each station, and the trick dispatchers are only in the chief dispatcher's office.

407 Q. In his office?

A. In his office, and handle the train orders from there.

408 Q. Are there any what you call "trick dispatchers" except in the chief train dispatcher's office?

A. That is all.

409 Q. And all of the other men in and along depots are not dispatchers at all, they are operators?

A. They are called telegraphers, operators.

410 Q. Well they sign "Opr"—operator?

A. Yes sir.

411 Q. Mr. Cavanagh, I hand you Exhibit number "9," and will ask you to state whether that is what it purports to be on its face?

119 A. It is

412 Q. And you may state whether that was the time table of the Chicago, Rock Island & Pacific Railway Company, central district, Nebraska Division, on December 8, 1909?

A. It was.

413 Q. Trains on your system between Fairbury and Albright, or South Omaha, were operated under that time table?

A. Yes; between Fairbury and Albright.

414 Q. Between Fairbury and Albright?

A. Yes sir.

415 Q. Well, any where else?

A. Well, west here, Fairbury to Phillipsburg, and Horton to Jansen, Fairbury to Nelson, and the Council Bluffs yards.

416 Q. I take it that these are changed some times, not very often as far as the district is concerned, but this is the one that was effective at that time?

A. Yes sir.

417 Q. I wish you would tell the jury, Mr. Cavanagh, whether or not all train orders originate,—I mean all train orders now on what you have charge, your three divisions that you say—

A. Yes; four of them.

418 Q. Whether they originate in your office?

A. They do.

419 Q. They do?

A. Yes sir.

420 Q. Well, Mr. Cavanagh, suppose a train is at Plymouth, Nebraska, between here and Fairbury, and you wish to give an order to that conductor, the man who has charge of that train, how do you do it?

120 A. Send it by telegraph to the operator at Plymouth, and it is repeated by the operator at Plymouth to the dispatcher, and the dispatcher "O. K's." and completes the order to the operator.

421 Q. And then what does the operator do?

A. The operator delivers it to the engineer, gets his signature and at that time repeats the signature to the dispatcher.

422 Q. Then your orders are delivered along the way to the man in charge of the train by the operators?

A. Yes sir.

423 Q. Did I understand you to say that when an order is delivered to an operator at Plymouth from your office, originating in your office, that before the operator there delivers it to the engineer or conductor on the train that he repeats it now to verify it?

A. Yes sir.

424 Q. Is it for that purpose?

A. Yes; and it is underlined by the dispatcher as it is repeated, or copied in the book. The first man, it is copied in the book; the second man that repeats it it is underlined.

425 Q. Mr. Cavanagh, state whether or not it is a fact whether the orders originating in your office are numbered?

A. They are.

426 Q. Are they numbered each day, or how?

A. Commencing at midnight.

427 Q. Each day?

A. Yes sir.

428 Q. Commencing at number "1"?

A. Yes sir.

429 Q. And all orders from midnight to midnight run consecutively?

121 A. Yes sir.

430 Q. And all orders originating from your office are numbered then?

A. Yes sir.

431 Q. Does that number appear on the order; for instance that you send to Plymouth to deliver to somebody as you do?

A. Yes sir.

432 Q. And the order written out there by the operator?

A. Yes sir.

433 Q. Of course the operator there writes it out in his hand writing?

A. Yes sir.

434 Q. You send the message over the wire, by wire or telephone?

A. By wire, telegraph.

435 Q. You may state whether you have in your possession telegraphic train order number 28 issued out of your office December 8, 1909?

A. I haven't the original train order; I have the dispatcher's order in his train order book.

436 Q. Have you got that book?

A. Yes sir.

437 Q. I wish you would produce it?

A. In getting this book I wish you would return it to my files.

Mr. Berge: Yes.

(Witness produces book.)

438 Q. You may state, Mr. Cavanagh, whether these orders bear your signature, or your initials?

A. They bear my initials.

439 Q. Is that a rule?

A. Yes sir.

440 Q. What about the operator?

122 A. The operator in part of it he uses his initial, and part his last name in full.

441 Q. Now, orders sent on December 8, 1909, did you keep a copy of them?

A. We keep copies on file in the telegraph office for a certain length of time, and the train order book is a permanent record.

442 Q. Does the train order book correspond with the order itself?

A. Why, it is not made out in exactly the same form but it is according to the rules of the railroad company, as the dispatcher handles his train orders. As far as the body of the order is concerned it should read identical.

443 Q. Do you know who was operator in Fairbury on December 8, 1909?

A. I could not state positively, but I think they have seven operators there, and I could not say positively which one.

444 Q. Well, I hand you Exhibit "11," Mr. Cavanagh, and will ask you to examine it and state, if you can, in whose hand writing that is?

A. J. G. Routt's.

445 Q. Who was he at that time?

A. Operator at Fairbury, Nebraska.

446 Q. Do you know his hand writing?

A. I do.

447 Q. That is his hand writing is it?

A. Yes sir.

448 Q. And did that order originate in your office that day?

A. This order here originated in my office through the telegraph, and the operator in the operator's office.

449 Q. At Fairbury?

123 A. At Fairbury.

450 Q. Would you telegraph to the operator at Fairbury?

A. We would; the dispatchers are in a separate distinct room, in a private room.

451 Q. And you are in the same depot?

A. In the same building.

452 Q. That is an order sent by you that day?

A. Sent by dispatcher McCoy.

453 Q. Originating in your office?

A. Originating in my office.

454 Q. Who is "McCoy"?

A. What we call one of the trick dispatchers.

455 Q. One of your subordinates?

A. Yes sir.

456 Q. Is that the order that was given that —?

A. That is the order that was given that day, December 8th.

Mr. Berge: The plaintiff offers in evidence Exhibit "11."

Exhibit "11" received in evidence without objection and read to the court and jury, attached at end of bill of exceptions, and made a part hereof.

457 Q. "W. C. C." that is W. C. Cavanagh?

A. Yes sir.

458 Q. Is that the train number? (Indicating.)

A. That "X" there means "extra," and this is the number of the engine, "1486."

459 Q. "X. 1486" and the word "complete."

A. Complete.

124 460 Q. Dispatcher "W. H. M." is "W. H. McCoy"?

A. Yes sir.

461 Q. The operator?

A. "Routt."

462 Q. Now, Mr. Cavanagh, I hand you Exhibit "12" and will ask you to examine that, and ask you to state if you know in whose hand writing it is?

A. Mr. Routt's.

463 Q. Who is he?

A. Operator at Fairbury.

464 Q. And your initials on there?

A. Yes sir.

465 Q. Is all of the writing on there in his hand writing?

A. It is not.

466 Q. Except what?

A. Excepting the conductor's name, and train number, on number 86, engineer Wright on extra 1486. They wrote it themselves.

467 Q. Who wrote it?

A. Conductor Packer wrote his, and engineer Wright wrote his.

468 Q. Had they signed a duplicate of that in your office as they got it?

A. Yes; there was three copies taken; in this case there would be seven or nine copies taken, the bottom copy is retained in our office for a period of one year, or in the telegraph office rather.

469 Q. Now what you have just now said with respect to Exhibit "12," is that true of Exhibit "11," the writing underneath?

A. Yes; the engineer or conductor, it was the engineer in this case, with 1486, signed this order himself.

125 470 Q. Mr. Wright?

A. Yes sir.

471 Q. With the exception as you have explained, the other is in the hand writing of the operator there?

A. Yes sir; all except the signature and the train number.

472 Q. Did that order originate in your office that day?

A. It did.

473 Q. That "W. C. C." there are your initials again?

A. Yes sir.

474 Q. All orders require that?

A. All orders require it.

475 Q. Although you don't yourself always sign it?

A. No sir. The order would not be complete without it. The engineer would refuse it.

Mr. Berge: The plaintiff offers in evidence Exhibit "12."

Mr. Holmes: The defendant objects to the introduction of Exhibit "12" for the reason that it is incompetent, immaterial, irrelevant. Now, I don't object, your Honor, I would like to say just this, I don't object to any of these train orders going into this case, but here is an exhibit, and there are many of them, and a good deal of time is being spent on this; this has nothing to do whatever with the cause of action in this case. Now many of those orders are orders that were delivered between Fairbury and Lincoln. The engine got to Lincoln, those train orders that come before don't serve any purpose here. Now here is one that has nothing to do at all, and cannot even be construed or stretched in any

126 way to comply or add to this case in anyway.

We object as immaterial.

Mr. Berge: I want to offer this in evidence to show to the jury just how a train gets through. Of course I have in evidence now the order to run from Fairbury to Albright originating in the Chief train dispatcher's office. I want to show how the engineer or conductor, how they got from Fairbury, for instance, to Albright on that day. I want to show that, and beyond that I won't go.

Overruled.

The defendant excepts.

476 Q. There is some writing in there, I could not tell what that might be after the "8"?

A. That is "8th."

Exhibit "12" received in evidence, read to the Court and jury, attached at end of Bill of Exceptions and made a part hereof.

Court: That is a different train. Let it go, it won't do any harm.

477 Q. Mr. Cavanagh, I will hand you Exhibit "10," tell the jury if you know what that is?

A. Simply called a clearance card.

478 Q. And do you know in whose hand writing it is?

A. Operator Routt's at Fairbury.

479 Q. All in his hand writing is it?

A. Yes sir.

480 Q. And were those delivered to out-going trains?

127 A. Where ever they get orders, the number of the orders are put on the clearance card so that the engineer can check against his orders and know that he has got all of his orders that are coming to him.

481 Q. That is handed him when he has got all of his orders, that is the last thing that is given to him?

A. Yes; it is delivered with the order.

482 Q. Well, what significance has it beyond that?

A. Not any in this case.

483 Q. Well, in this case; speaking generally?

A. Well, in any case it does not interfere or countermand any orders that he has received. It is simply a check on the orders to show that they are properly delivered.

484 Q. Well, does he get that when he starts out?

A. He does.

485 Q. That is the last thing he gets?

A. Yes sir.

486 Q. Some of those orders they get before they go, don't they?

A. They get them all before they start out.

487 Q. Some time before they go?

A. It depends on circumstances; they might get an order that a train is running late, and if they cannot get out they come back and get another one.

488 Q. As I understand it Exhibit "12" was delivered to him some time before he left?

A. I will have to get the train sheet to see what time he left.

489 Q. Will it show itself?

A. The train sheet will show the time he left.

490 Q. Will Exhibit "11" show when he left?

A. No sir.

491 Q. It shows the delivery to him?

128 A. It shows the delivery on the clearance card. We have a clearance card with each train order.

492 Q. Here is a clearance card, with one of them isn't it?

A. Yes sir.

493 Q. When does an engineer know, or conductor, just when she left, from what?

A. When he gets this clearance card, and if he cannot get out he returns and gets another order, a clearance card.

494 Q. Don't the clearance card itself indicate when he should get out?

A. No; it shows the time he left.

495 Q. Does it show when he is ordered?

A. Gives him permission to go on his train orders, whenever he wants to, whenever he feels like it; when the train is ready, and everything else is ready to go, he takes the train the order calls for.

496 Q. Let me ask you, Mr. Cavanagh, are not conductors or engineers required under express command from the train dispatcher's office to start at a particular time?

A. No sir; there is lots of times there is hot boxes, or engines not ready, or possibly a brakeman not called.

497 Q. But eliminating all that?

A. Eliminating all that they have permission to go whenever they are ready to start after they get their train orders and the clearance card.

498 Q. Why is that called a clearance card?

A. Simply as a check on the orders, and showing that they are clear with the train orders.

499 Q. Does that mean that the track is clear?

A. No sir; the train orders govern that.

129 500 Q. The train orders govern that?

A. Yes sir.

501 Q. The clearance card then indicates that everything is ready for him to go?

A. Yes sir.

502 Q. He can go in two minutes after he is ready?

A. Yes; in one minute providing the train orders permit it.

503 Q. You would not deliver the train orders unless he did?

A. Yes; deliver the train orders, on the road, the train orders; and he is governed by the train orders.

504 Q. Take Exhibit "11" here; when he is ordered to run extra from Fairbury to Albright, that doesn't indicate when he shall start?

A. He can start if his time table rights will allow him to, and clear regular trains.

505 Q. He can dodge through any time he wants to?

A. Yes sir; providing he can make certain stages on his time table rights.

506 Q. He would be entitled to a clearance card on train No. 28?

A. Yes; simply to show that that order was delivered to him.

507 Q. Does he get a clearance card with every order?

A. When he gets an order one train starts—

508 Q. He would not get a clearance card with train order number "4"?

A. What one is that.

509 Q. Simply telling about another train?

A. Yes; he would get a clearance card with that if it was with the other orders, it would be on the same clearance card. Now, if he got the two orders, the two numbers of those orders will appear on the clearance card showing that those orders were delivered to him.

130 510 Q. Now, Mr. Cavanagh, what does the telegraphic train order No. 28 when delivered to Mr. Wright mean to him?

A. "Engine 1486 will run extra Fairbury to Albright." That means he has the right to go from Fairbury to Albright keeping clear of all regular trains.

511 Q. Regular trains?

A. Yes sir.

512 Q. If there are other trains that are not regular trains he is supposed to be advised of it?

A. Yes; that is, trains, not switch engines or yard engines.

513 Q. If there are other trains not regular trains he is supposed to be advised?

A. Yes sir.

514 Q. And you do advise him?

A. Yes sir.

515 Q. Was this a special or an extra train?

A. An extra train.

516 Q. What was the number?

A. #1486.

517 Q. Did you personally know Mr. Wright?

A. I did.

518 Q. Now when you send orders along the way, take Mr. Wright's on his way to Albright we will say, at Plymouth or at Lincoln would you give him an order, would he get a clearance card with his orders there?

A. Yes sir.

519 Q. *How* would deliver this clearance card?

A. The operator.

Mr. Berge: The plaintiff offers in evidence Exhibit "10."

131 Cross-examination.

Examined by Mr. Holmes as to competency:

520 Q. Do you get a copy of this, what you call a clearance card?

A. We don't; the operator has it.

521 Q. Each operator keeps that?

A. Yes sir.

522 Q. And gives one to the conductor?

A. One to the conductor and one to the engineer.

523 Q. Does the conductor sign the clearance card?

A. He does not.

524 Q. Does he sign the one the operator keeps?

A. He does not.

525 Q. But he does not get this card until he gets the train order?

A. That is it.

526 Q. And every time he gets a train order, no matter what it is he gets one of these cards?

A. He gets that at the time the operator clears them, with the train order; there may be one or more orders.

527 Q. This card, exhibit "10," has nothing to do, as I understand you with the running of the train?

A. Not any more than clearing him, that is train orders it has nothing to do with the running.

528 Q. It does not mean that the track is clear; he can just shoot along as he pleases?

A. It does not, the order governs that, the train order.

529 Q. And subject to the rules of the Company?

Mr. Berge: The plaintiff objects as not an examination touching the foundation of this and improper cross examination.

Overruled.

The plaintiff excepts.

A. Subject to the time table rules and the book of rules and the other rules of the company.

530 Q. What is —, Mr. Cavanaugh, that the conductor of the train signs, those train orders?

A. Train orders.

531 Q. And any order that Mr. Wright might have received you would have his receipt for the order on the bottom?

A. Yes sir.

532 Q. And this train order is sent to you after his signature is obtained?

A. The operator repeats his signature to the dispatcher, and the dispatcher completes the order.

Mr. Holmes: The defendant makes no objection.

Exhibit "1" received in evidence, attached hereto at the end of the bill of exceptions and made a part hereof.

Exhibit "10" read to the court and jury by Mr. Berge at this time.

Direct examination resumed.

Examined by Mr. Berge for plaintiff.

533 Q. I was going to ask you, Mr. Cavanaugh, when its says, "signal is out for terminal" —

A. At the terminals we do not have the telegraph signals and we use the word "terminal", as all trains are obliged to go to the telegraph station and get their orders, sign the orders and read the bulletin boards over and register out.

133 534 Q. The significance of the clearance card to a conductor or engineer is that now he has all of the orders before stopping?

A. That is just a check on his orders delivered.

535 Q. Ready to go though.

A. Ready to go.

536 Q. He would not have a right to go though until he got it, would he?

A. No sir.

537 Q. Mr. Cavanaugh, had you any order originating in your office and directed by your office that day co-ntermanding the train order, telegraphic train order No. 28, and state whether that is the order for Mr. Wright to run from Fairbury to Albright that day?

A. There is no objection to checking this up, is there to see?

538 Q. No sir, I want the fact about it?

A. There are, I find that order was annulled after the accident east of Lincoln.

539 Q. Well, it was annulled after the accident?

A. Yes sir.

540 Q. Was it annulled before?

A. It was not.

541 Q. And up to the time of the accident it was in full force, was it?

A. Yes sir.

542 Q. How was it indicated, cancellation or annulled?

A. Just simply order No. 52 of Extra #1486 Lincoln. Mr. Evans handled the order.

543 Q. Who did he give it to?

A. Orders #28 and #38 annulled. He gave it to the flag-  
134 man Mr. Hinitt that was with him.

544 Q. Now Albright, where is that?

A. Albright is just this side of South Omaha. I don't know the exact distance.

545 Q. The time table, Exhibit No. "9", gives all of the regular trains, supposed to?

A. Yes sir.

546 Q. And this Exhibit "9" does, of course?

A. Yes sir.

547 Q. And as I understand you when a man has his order, and has got his clearance cards he runs from the place where his order, or Mr. Wright did that day, to Albright, with this time card, knowing of other trains?

A. Yes sir.

548 Q. And if they were late he was advised of it?

A. He was advised of it.

549 Q. And the second exhibit I have here is one of the orders advising him of another train that is late?

A. Running late.

550 Q. And running towards him?

A. Yes, it might be running in the same direction, a superior train.

551 Q. If there was an inferior train it probably would not?

A. There is nothing inferior to extras, only switch engines.

552 Q. Then Mr. Wright was supposed to, and was, given directions with respect to all other trains regulars, that might be late running either way?

A. I could not say as to that, it might not have been, no sir. At the time he got these exhibits you have given me he would have time on late trains.

135 553 Q. It might be so far away?

A. Yes sir.

554 Q. But if he was likely to meet the trains, he would then be advised of their lateness, wouldn't he?

A. If they were late.

555 Q. If they were not late nothing was said to him about it?

A. Nothing said to him only his time table.

556 Q. Do all of the trains run that way?

A. Not all of the trains, all extra trains.

557 Q. Are regular trains run that way?

A. Inferior regular trains, and superior. They have certain rights according to their superiority. West bound trains are superior to east bound trains. A First class west bound trains is superior to all trains.

558 Q. Do conductors and train men understand that?

A. Yes, they are all examined on the road that way.

559 Q. Is that information conveyed to them in these rules?

A. Yes, in a book of rules.

560 Q. But not in this exhibit "9"?

A. In certain case in the time table.

561 Q. But so far as running an extra, you call it and inferior train; now, or part of the running orders, and outside of the running orders they get no orders unless trains were late?

A. But they would if late. The- give an extra train,— it is this, if we have a freight train or light engine going east and have other freight trains that are regular trains going west, we would give them a meeting order.

562 Q. How do engineers know when you are going to do it or not?

A. They don't know until they see the signal explained, and by order handed to them, or the sign the "31" order.

136 563 Q. But regular freight trains running on time, do they receive orders?

A. Lots of times.

564 Q. They do not run like the extra?

A. If a regular freight train was on time and if extra #1486 a light engine was going east on this No. 47, she was nine hours late, he would make a meeting point of those two trains.

565 Q. In the case of Mr. Wright would he be advised only that the train was late? or would he be advised just where he would meet a certain train?

A. He would first be advised that this train was running nine hours late, and was not passed out of Council Bluffs. At any rate when they would get out that would give him that much time to advance, as they got close to the meeting point, and when they left Albright he could see what they were going to do. We would possible give them a meeting point.

566 Q. Would he know it?

A. Would know it when we found it out; possibly get it at Fairbury or possibly at Plymouth, eight or ten stations apart on the order sent to the operator at the meeting point.

567 Q. When he would leave Fairbury he would not know unless it was delivered to him, whether he was going to get a meeting order or not, or whether he was going to clear on his own order?

A. No sir.

568 Q. Do you know the occasion of this engine being ordered to Albright that day?

A. Yes sir.

137 569 Q. What was it?

A. I simply ordered it; it came from Phillipsburg, going to Albright.

570 Q. He did not take it to Phillipsburg?

A. I believe he did. I don't know the circumstances exactly; I can tell by the train sheet.

571 Q. He started that day from Fairbury?

A. Yes sir.

572 Q. What was the purpose of taking that engine up there, do you know?

A. It was on her way to the shop.

573 Q. Do you know of your own knowledge whether he had a full train crew with him?

A. He had all that the law requires and what we run all light engines with, an engineer and fireman and a flagman.

574 Q. Do you know who it was that accompanied Mr. Wright on that trip?

A. (continued on next page)

138 575 Q. Do you know who it was that accompanied Mr. Wright on that trip?

A. The fireman, I could not say as to his name, but the flagman, was brakeman Hinitt.

576 Q. Well, was he conductor, too?

A. No, he was a flagman. When they are going with light engines they are called flagmen, and when with a crew they are called brakemen.

577 Q. This engine #1486?

A. Yes sir.

578 Q. A light engine, or heavy?

A. A light engine.

579 Q. Do you know that of your own knowledge?

A. Yes, pardon me,—I don't know what you mean between a light and a heavy engine?

580 Q. I was going to ask you?

A. What we call a light engine is an engine going without any cars, not the size of the engine.

581 Q. Well, the engine itself, was it a large engine or small engine?

A. It was a medium class 1400; we have some smaller and some larger.

582 Q. Was it a freight engine?

A. Yes, I believe so, we use that, I could not say for sure whether that was used in freight or passenger service last. We use the 1400 engines on passenger, and we use them on freights.

583 Q. Now, Mr. Cavanaugh, outside of orders telling Mr. Wright about other trains being late, was there any other order given him that day except as you have testified to?

139 A. I think you have some orders there.

584 Q. There were other orders advising him of other trains?

A. Yes sir.

585 Q. Not speaking of those but pertaining simply to the running of his own engine, were there other orders besides #28 from Fairbury to Albright?

A. I want to get what you mean. We only had one set of what we call "running orders" from Fairbury to Albright.

586 Q. That is what you call "running orders"?

A. Yes, it gives him authority to go from Fairbury to Albright.

587 Q. All other orders had to do with advice to him as to other trains?

A. Yes sir; he might possibly have had something on slow track.

588 Q. Can you tell the jury just when it was that Mr. Wright left Fairbury that day?

A. I can, by consulting my train sheet.

589 Q. I wish you would do it. Do you have it here?

A. I understand those are the same as the other.

Mr. Holmes: We will let you take them back.

A. I have to keep this on our files in the office, you know. "Left Fairbury at 11:40 A. M., December 8, 1909."

590 Q. Well, on Exhibit "11," his "running order" exhibit, as I will call it, he did not get that at 11:26?

A. He got it; it was made complete at 11:26 A. M., left there 14 minutes after he got his orders.

591 Q. Now, does this clearance card, have any time on it that would throw any light on the subject?

140 A. No; that is supposed to be the same time as the train order; they are supposed to be delivered together. It shows 11:26, the same time the order is completed.

592 Q. Then he left 14 minutes after he got the order?

A. Yes sir.

593 Q. That is correct, is it?

A. Yes sir.

594 Q. Do you have any record as to when he arrived in Lincoln?

A. I do.

595 Q. When did he arrive in Lincoln?

A. "Arrived in Lincoln at 1:20 P. M. December 8th."

596 Q. At 1:20?

A. Yes sir.

597 Q. What are you refreshing your memory from, what is the nature of the paper?

A. The telegraph movement of the trains.

598 Q. Does that show the complete history of the movement of all trains?

A. It does on the sub-division.

599 Q. That is what I mean?

A. Yes sir.

600 Q. And you have a record in your office of just whenever a train arrives and left?

A. Yes sir; it contains the arriving and departing time and if

they pass the station, the time they passed the station; if there is an open telegraph office at that switch.

601 Q. You say he arrived here, when?

A. At 1:20 P. M.

602 Q. When did he leave?

141 A. 2:04 P. M.

603 Q. Now, Mr. Cavanuagh, I will ask you to examine exhibits "17" and "18," being train orders No. 35 and No. 38 of that day, and I will ask you to state whether this had to do with Mr. Wright's run on that day?

Mr. Holmes: Wait a minute. At what point?

Mr. Berge: Between Fairbury and Albright.

Mr. Holmes: The defendant objects as immaterial and a waste of time.

Overruled.

The defendant excepts.

A. Simply giving him time on regular trains.

604 Q. Giving who time?

A. Extra #1486 east No. 85 Lincoln yards.

605 Q. In charge of whom?

A. Extra #1486 in charge of Engineer Wright.

606 Q. And did those orders originate in your office?

A. They did.

607 Q. And those initials, "W. C. C." is that your name?

A. They are.

608 Q. Written by whom?

A. Both of them by operator Evans.

609 Q. Where?

A. At Lincoln.

610 Q. Can you tell when they were delivered to Mr. Wright?

A. At 2:05 P. M.

611 Q. You say he left Lincoln yards when?

A. Left the Lincoln yards at 2:05 P. M., the time he registered out.

142 612 Q. Then, he left the Lincoln yards immediately after receiving these orders?

A. According to this he left the depot, I would not say he left the yards; he could have went down to the east in the yards.

613 Q. I mean the depot. Do you know Mr. Evans?

A. I believe I do, yes sir.

614 Q. Is Exhibit "16" in his handwriting?

A. I think that is it.

615 Q. But so far as "17" and "18" are concerned those came from your office at Fairbury?

A. Not those orders.

616 Q. But the orders themselves?

A. They originated there.

617 Q. And they were delivered to Engineer Wright by the operator at Lincoln?

A. Supposed to have been delivered by him.

618 Q. I will ask you another question. I will ask you whether exhibits "15" and "14" originated in your office and had to do with the running orders of Wright from Fairbury to Albright?

A. Yes; the same as the other time of superior trains.

619 Q. Did not interfere with his other running orders except the time of other trains?

A. As far as the other orders were concerned it gave him permission to go farther than if he did not have them.

620 Q. Keeping him posted?

A. Giving him the right to proceed on that late order.

621 Q. Exhibit "14", do you know whose handwriting?

A. Mr. Sadilek, at Plymouth.

622 Q. These orders, "14" and "15," originated in your  
143 office and supposed to be delivered by Mr. Sadilek, operator at Plymouth to Mr. Wright?

A. Yes sir; Exhibit "14" was handled by operator Sadilek and delivered by him. Exhibit No. "15" was received by operator Edwards and delivered by operator Sadilek.

623 Q. At what place?

A. At Plymouth.

624 Q. Plymouth is where, east of Fairbury?

A. The second station east of Fairbury.

Mr. Berge: The plaintiff offers in evidence exhibits "13", "14" and "15", clearance card and two orders.

Mr. Holmes: The defendant objects to exhibits "13", "14" and "15", for the reason that they are wholly immaterial and incompetent, and not within the issues of this case and showing that those orders were made and delivered between Fairbury and Lincoln, and the testimony having shown that the engine had already reached Lincoln prior to the accident.

Mr. Berge: Then let the record show that I offer them for the purpose of showing the method of running extra trains and how they are advised of other trains as a part of this original running orders from Fairbury to Albright.

Court: Those all relate to other trains?

Mr. Berge: They relate to advising Mr. Wright about other trains.

Overruled.

The defendant excepts.

144 Exhibits "13", "14" and "15" received in evidence attached hereto at the end of this bill of exceptions and made a part hereof.

Mr. Berge: I offer in evidence exhibit No. "9", railroad time table. Let the record show it goes in without objections.

Exhibit "9" received in evidence, attached hereto at the end of this bill of exceptions and made a part hereof.

## Cross-examination.

Examined by Mr. Holmes for defendant:

625 Q. What time did you say, Mr. Cavanaugh, that train left Fairbury, that extra?

A. I think it was 11:40,—just a minute,—11:40 A. M.

626 Q. How far is it from Fairbury to Lincoln?

A. 57.1 miles.

627 Q. Did any of those train orders that you have been examining, did they tell, or order Mr. Wright to leave Lincoln at a certain time?

A. They did not.

628 Q. What governed his leaving Lincoln?

A. According to his right and his train order.

629 Q. When he got his train order at Fairbury in the morning, say, to run to Albright, that was his order wasn't it; he had a right to go to Albright?

A. Yes sir.

145 630 Q. Subject, however, to such orders as he might receive from time to time?

A. Yes sir; from time to time.

631 Q. Now, the only orders he received at Lincoln was the order that you have been testifying about, telling him that certain trains were late and he should meet at certain points?

A. Yes sir. Well, there was none offered in evidence, saying at what point he should meet.

632 Q. But aside from the meeting order, and aside from advising him what the time was for the running of the other trains, that is all the orders he had, except the original order at Fairbury?

A. Yes sir.

633 Q. Now, those cards that are called "clearance cards," what is the real purpose of those, Mr. Cavanaugh?

A. Just simply for to give them a check, you know, that they have all orders that are intended for them at that point.

634 Q. It is merely a checking between your office and the engineer?

A. The engineer,—well no.

635 Q. And the operator?

A. The operator.

636 Q. The three people. That day, do your books show that you sent any telegrams advising him of the switch engine in the Lincoln yards?

Mr. Berge: The plaintiff objects as not cross examination.  
Overruled.

The plaintiff excepts.

A. I have no record of any here.

146 637 Q. Well, you would have made a record had you done so, wouldn't you?

A. —.

Mr. Berge: The plaintiff objects as not proper cross examination, calling for an opinion and conclusion of the witness, not a statement of any fact.

Overruled.

The plaintiff excepts.

A. Yes sir.

638 Q. Well, why didn't you do that, Mr. Cavanaugh?

Mr. Berge: The plaintiff objects as calling for an opinion and conclusion of the witness, not proper cross examination, immaterial and incompetent.

Overruled.

The plaintiff excepts.

A. Because we did not consider it necessary. According to the rules, you never do advise extra trains of switch engines in yards. Other rules govern.

639 Q. Do you advise other trains of switch engines?

A. No sir.

640 Q. Why don't you do that?

Mr. Berge: The plaintiff objects as not cross examination, what they do with other trains, incompetent, immaterial, proving no issue in the case.

Overruled.

The plaintiff excepts.

A. The time table rule No. 16, I believe is the number, governs that part of the yards, that all extra trains will approach and run through the yards under full control or under control.

147 641 Q. Well, rule 16 in this time table?

A. Time table No. 11.

642 Q. Will you refer to that and read us that rule?

A. Time table No. 11 D. Nebraska Division. Governing Sub-division No. 13.

Mr. Berge: Well, read that.

A. How is that?

643 Q. Read the rules?

A. Rule No. 16. "All except first-class trains will approach, enter and pass through the following named yards under full control expecting to find main track occupied or obstructed: Albright, Fairbury, Lincoln, Belleville, Jansen Junction and Phillipsburg."

644 Q. And is that the reason that the Dispatcher does not notify other trains about the switch engine?

A. It is.

645 Q. Well, now, what kind of a train Mr. Cavanaugh, was this extra #1486 that day?

A. It was an extra train.

646 Q. I know, but was it a first-class train?

A. No sir; it was an inferior train.

647 Q. A what?

A. Inferior extra train, inferior to first-class, second and third-class trains.

648 Q. What are first-class trains?

A. They are principally passenger trains.

649 Q. And then what is a second class train?

A. That is our high-class merchandise train, freight trains, stock trains.

148 650 Q. And the third-class?

A. Is local freight trains.

651 Q. And the fourth-class?

A. We don't have any.

652 Q. And this extra #1486 would not take its place in any of those classes, then?

A. It would not.

653 Q. Does the time table show there what class that extra is. I will ask you, Mr. Cavanaugh, if it is not a fact?

Mr. Berge: I want that answer.

Question withdrawn.

654 Q. I will ask you if that time table does not show all classes of trains, excepting extras?

A. It does; extras are not considered in any class.

655 Q. How?

A. Extras are not considered in any class, only as inferior trains, there is the point. Is that the point you wanted to make?

656 Q. As train Dispatcher that day, did you know that the switch engine was in the yard at Lincoln?

A. Why, we *dod*, yes, in this way; we know that there is an engine assigned to that service.

657 Q. And what does that engine do, Mr. Cavanaugh?

A. It switches cars around in Lincoln yards, and inside of the yard limit boards, which govern the control of trains approaching, which have no right to approach the yards under faster speed. There is a board up, that says: "Yard limits," at each end of the yard.

149 658 Q. What does that switch engine have to do in protecting itself as to the approach of trains?

A. Only protect itself according to that rule against fast trains.

659 Q. But if I understand you right, otherwise, and other trains have to protect themselves against switch engines?

A. They do.

Redirect examination.

Examined by Mr. Berge for the plaintiff:

660 Q. Now, if I understand you, Mr. Cavanaugh, from Judge Holmes' questions, there is not anything in those rules exhibit "9," is it marked "9"?

A. Yes.

661 Q. Governing extra trains?

A. What is that question?

662 Q. Is there anything in those rules governing extra trains?

A. There are.

663 Q. Well, what did you say was not in those rules?

A. The class; he wanted to know if they had any class in the time table, and it was a new question to me, and I wanted to make sure before I answered it, because extras, as I understand it, have no class: they are absolutely inferior trains and are governed by other rules and other orders.

664 Q. You mean passenger trains?

A. Yes; running on specials.

150 665 Q. You don't run them by——

A. Give them a right by special train order.

666 Q. Give this engine a right to run?

A. A right to run only, not a right over other trains.

667 Q. You don't give special passengers a right?

A. Yes, we do have a regular order giving them a right over all trains. They would be termed "extras" the same as a freight train, or we would say "a passenger extra."

668 Q. But you would advise extra passenger trains of other trains?

A. If we gave them an order, giving them a right over all trains, we would not give them anything on other trains.

669 Q. Suppose you have an extra and did not give them a right over all trains?

A. We would handle them the same as this train, if we did not give them a right by train order.

670 Q. You would not advise an extra passenger train of switch engines in any of the yards?

A. No sir.

671 Q. All you know about this switch engine was that when it was in Lincoln it was in the yards?

— We put out the time of all special trains for the use of the switch engines so they can work, except on the time of first-class trains only.

672 Q. Of course, switch engines are supposed to keep out of the way of all trains?

A. They are, except an extra train going through the yards.

673 Q. It certainly is a fact that no trains ever passed a side-track because there is a switch engine on the main track, unless by special order?

A. Yes, they do.

151 674 Q. Just to get out of the way of the switch engines pulling a whole train on the side track?

A. Yes sir.

675 Q. What occasions?

A. If the switch engine cared to go out there, he would simply put them through the switch, the yard master, if he wanted to use the main line, he would throw the switch and put them through the siding.

676 Q. That is, switch engine would put him through the siding?

A. No; the yard master; or if an extra going through the yard would see the switch engine on the main line, possibly the head brakeman, would head them on.

677 Q. They might do that very same thing with a passenger train?

A. It depends on the occasion. They probably would be censored for it.

678 Q. Well, the yard master could do that?

A. Yes.

679 Q. And if I understand you correctly, an extra train, whether a passenger or a freight, belongs to no class?

A. It belongs to no class unless they are given a right by train order.

680 Q. But so far as time tables go, they belong to no class?

A. No class, except the right by train order, that is the only thing.

Mr. Berge: The plaintiff offers in evidence Exhibit "16".

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial.

Overruled.

The defendant excepts.

152 Exhibit "16" read to the Court and jury, by Mr. Berge, and received in evidence, attached hereto at end of bill of exceptions and made a part hereof.

Mr. Berge: The plaintiff offers in evidence exhibit "17".

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial.

Overruled.

The defendant excepts.

Exhibit "17" read to the Court and jury, by Mr. Berge, received in evidence, attached hereto at end of bill of exceptions and made a part hereof.

Mr. Berge: The plaintiff offers in evidence exhibit "18".

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial.

Overruled.

The defendant excepts.

Exhibit "18" received in evidence, read to the Court and jury by Mr. Berge, attached hereto at end of bill of exceptions and made a part hereof.

381 Q. Mr. Cavanaugh, these are the orders that were delivered at Lincoln to Mr. Wright?

A. Yes sir.

682 Q. And I don't see as they bear his receipt, as some of the others, how is that?

A. One is the 19th order, which we do not require any receipt for, as it simply assists the train and does not restrict his rights, and 31 order, is used where we restrict the rights of trains, or at terminals where we do not use the 19 order.

153 683 Q. Now, the running order of Mr. Wright from Fairbury to Albright, what kind of an order do you call that?

A. 31—order.

684 Q. His signature would be required there?

A. Yes sir.

## Recross-examination.

Examined by Mr. Holmes for the defendant:

685 Q. I don't know as I understand, Mr. Cavanaugh, yet. Does the switch engine have a right to go out on the main line?

A. Not without time on regular trains.

686 Q. All it has to look out for is the first-class trains?

A. The first-class trains.

687 Q. Then, looking out for first-class trains, does the switch engine have a right to go out on the main line?

A. It has.

688 Q. And as against the first-class trains only, does the switch engine have to protect itself?

A. It does.

689 Q. All other trains have to protect themselves as against the switch engines?

A. That is it.

690 Q. Now, this engine was running light?

A. Running light.

691 Q. That means, that it was not pulling anything except itself?

A. Just the engine itself.

692 Q. And I believe you stated the crew, consisting of the engineer, Mr. Wright, the flagman Mr. Hinitt, and the fireman?

154 A. Yes sir.

693 Q. You don't remember his name?

A. Yes sir; I don't remember.

694 Q. McLane?

A. McLane, I think, was the man.

695 Now, Mr. Cavanaugh, who was the conductor of that train?

A. The engineer.

696 Q. The flagman and the fireman were subject to his control and others?

A. They were; he was the absolute captain on the train or on the engine.

697 Q. Now, as to these last train orders, there is nothing in them telling Mr. Wright to go ahead, is there?

Mr. Berge: The plaintiff objects, his orders themselves will show and it is not the best evidence.

A. (No answer.)

698 Q. So that, Mr. Wright had his right to go from Lincoln at 2:05, getting it from the original train order in the morning at Fairbury.

A. Yes sir.

699 Q. Now, Mr. Cavanaugh, does your book show that any other or different orders other than have been shown to you?

A. Well, I will just look them over.

700 Q. In other words, let me ask you if there — in your rec-

ord showing that Mr. Wright, that is, extra # 1486 had a right over all other trains on the road?

A. No sir; I don't find anything that gives him a right over any other trains.

701 Q. Now, let me ask you if there is any other train order there, abrogating the rules that he would have to look out for first-class trains in the yard?

Mr. Berge: The plaintiff objects to that question as not *cross* examination, not the best evidence and the evidence so far being that extra trains didn't belong to any of the classes indicated in the rules, not cross examination, incompetent, irrelevant and immaterial.

Overruled.

The plaintiff excepts.

A. No sir.

702 Q. To what trains, Mr. Cavanaugh, does these rules apply?

Mr. Berge: The plaintiff objects as calling for an opinion and conclusion of the witness, and the rules themselves state, and calling for hearsay testimony, not the best evidence, not cross examination.

Sustained.

The defendant excepts.

703 Q. Does this time table that they have offered in evidence and the rules attached thereto govern extras?

Mr. Berge: The plaintiff objects as not cross examination, the time table itself will show, and incompetent, and seeking by oral testimony to change the written rules in the possession of the engineer, Wright.

Sustained.

The defendant excepts.

Redirect examination.

156 Examined by Mr. Berge for the plaintiff.

704 Q. Now, Mr. Cavanaugh, did I understand you to say that a switch engine did not have to get out of the way of regular freight trains?

A. They do not.

705 Q. Make freight all pull past them, do they?

A. Not all of them. As I said, if the yard master, flagged them and put them through the sidings he could do so.

706 Q. But, as a rule and generally a switch engine in the yards clears the main line for all trains, seems to?

A. Only first-class trains.

707 Q. But it must get out of the way for all freight trains going through?

A. No sir.

708 Q. Well, you mean to say that freight trains, long through trains, switch on side tracks to pass by switch engines?

A. Going into yards, as a rule, the through freight trains will take

the passing track, but as far as the rules are concerned, the switch engine does not have to get out of the way, or clear the main track for second or third class trains.

709 Q. What does it do?

A. It clears the time of first-class trains.

710 Q. Clears the time?

A. Yes sir.

711 Q. But then if it don't clear the time of the train it aims to get on the side-track and let the freight train take the track there?

A. There is nothing in the aim at all.

712 Q. They do it that way right along?

157 A. No sir.

713 Q. Isn't it habitually done that way right along in every freight yard?

A. I don't consider it is.

714 Q. Will you say that in Lincoln today a single freight train engine passes a train on the main track?

A. I don't think I understand.

715 Q. I mean whether in Lincoln today that a single freight train takes a side track to allow the switch engine to remain on the main track?

A. The condition governs that.

716 Q. Answer me?

A. Yes, ask the question again please?

Q. (Question read)?

A. I could not say what they done here today in the Lincoln yards.

717 Q. Well, your records show how trains pass at stations, or determined?

A. They do not except with outside points where we instruct them to take sidings, or in case of the right of a train that holds the main line.

718 Q. Take this day Mr. Wright came into this town, this city of course he had no orders with respect to any switch engine, you have already testified?

A. Yes sir.

719 Q. He would pull in, of course on the main line?

A. Not necessarily.

720 Q. Unless he had some orders to the contrary?

158 A. No, not necessarily an order, for his time table gave him a right to the main line, or those rules. He would come down the main line unless he intended to hedge in and stay there some time. There is no question in my mind but what he took the siding.

721 Q. When he gets his clearance card at Lincoln, that is, showing him the last order, he has a right to go?

A. Yes sir.

722 Q. Of course he gets on the main track and pulls out?

A. He may back out and get on the main line or he may go on down to the yard.

723 Q. Get on the main line?

A. Yes sir.

724 Q. But this extra belonged to none of the classes of the trains indicated in these rules exhibit "9"?

A. Not on the first, second or third class.

725 Q. Well, it don't belong to any of those classes?

A. No sir.

726 Q. There is no class except for second and third?

A. First, second and third.

727 Q. You have no rules governing any other train except first, second and third classes?

A. Yes sir.

728 Q. I mean any written rules?

A. Yes, rule 16 governs extra trains through Lincoln yards.

729 Q. But, I mean you haven't any rules that directly refer to any other class of trains?

A. Yes, that refers to all extras, not classes.

730 Q. I am speaking of classes?

A. No sir.

731 Q. And you have no rule which says that an extra is not a first-class train?

A. An extra is not a first-class train, no sir.

732 Q. And you have no rule which says that an extra is not a second class train?

A. No sir.

733 Q. Or that it is a second class train?

A. No; not unless you say——

734 Q. And you have no rule saying that an extra is a first-class?

A. No sir.

735 Q. Or that it is not. You said something about running under control. Do switch engines run under control in the city, in the yard limits?

A. They have their instructions.

736 Q. Where is there any rule about governing switch engines?

A. This rule right here in the time table (indicating).

737 Q. Does that govern on switch engines?

A. Yes, in the Lincoln yards, these different yards.

738 Q. I mean that applies to the government of the switch engine itself?

A. It certainly govern them and gives them their rights. (Referring to paper, rule 16.)

(By Mr. Holmes:)

739 Q. Read it?

Mr. Berge: Wait a minute. I am examining the witness.

740 Q. Now, 16 is the rule that you read a while ago?

A. Yes sir.

741 Q. Now, then, a switch engine is supposed to enter and pass a city like Lincoln under control. It does not say so there. This

says, all except first-class trains, but don't that rule refer to  
160 trains running through a city?

A. Yes sir.

742 Q. Well, that would not be a city?

A. No sir.

743 Q. I want to see a rule that controls the government of the switch engines?

A. "All except first-class trains will approach and pass through," that governs all trains except the switch engine, doesn't it. That gives the switch engines the right?

744 Q. That is the way you reason it out?

A. Yes sir.

745 Q. Is there anything in those rules that particularly pertains by name to switch engines?

A. I think that we will find something in the book of rules.

746 Q. According to your construction of the rules a switch engine would have to run under control?

A. Here, we will read here to you. Just a second. You asked for the rule on this and it governs here, I think.

747 Q. Get my question, don't answer any other

A. I will try not, if I do you may stop me: "That speed of trains in the city of Lincoln between "M" street, two blocks west of the passenger station and Vine street, east of Coal Depot, must not exceed six miles an hour."

748 Q. That does not refer to switch engines?

A. Yes it does.

749 Q. That don't include the whole yard?

A. That may be the whole yard.

750 Q. Where is there anything in those rules that mentions switch engines by name?

161 A. I could not say positively without going over the rules.

I would not say that there is not one or that there is, without going over the rules, but I do know, and I claim that that rule is in there in regard to the city limits of Lincoln.

751 Q. That rule in there in regard to the city limits of Lincoln don't include the entire yards of Lincoln, does it?

A. No, that one rule does not.

752 Q. No sir. Are there any rules you have besides this exhibit "9," which pertain to the government of the control or running of switch engines in terminals or in the city of Lincoln?

A. Yes, we have what we call "the book of rules."

753 Q. Have you got one here?

A. I think I have. You have got one there; I have got one too.

754 Q. Then, can, you tell from those rules when that was in force? (Handing witness a book.)

A. It took effect on August 1st, 1904.

755 Q. Well, was that effective on December 8th, 1909?

A. Yes sir.

756 Q. Now, of the Rock Island Road?

A. Yes sir.

757 Q. And the Chicago, Rock Island & Pacific?

A. Yes sir.

758 Q. Now, is there anything in those rules pertaining to the running of switch engines in the city of Lincoln, or in any of your cities?

A. Here is the definition of the yard which I believe governs, part of it: "A system of tracks within defined limits providing for the making up of trains, storing of cars, and other purposes over which movement not authorized by time table or by the train order, and be made subject to prescribed signals and regulations."

759 Q. Is there any section there that states about switch engines?

A. "Yard engines: an engine assigned to yard service and working within yard limits."

760 Q. Is that in a section by itself?

A. Yes sir.

761 Q. Is that the heading you read?

A. Right here, I read this first (indicating).

762 Q. Read that, I don't know what it is?

A. "Yard engines": an engine assigned to yard service and working within yard limits."

763 Q. That just tells what it is?

A. That is what it is. Now, in regard to the definition of the yard.

764 Q. You have read that?

A. Yes.

765 Q. Now, I wish after you have defined a yard engine, I wish you would find a section which defines how a yard engine must conduct itself in the yards?

A. All right, we will see what we will find.

766 Q. I wish you would define to this jury what you mean by running under control?

A. A definition of that, according to rules, is to be able to stop within its vision.

767 Q. Within its vision?

A. Yes, as far as a man can see.

163 768 Q. Within his vision you say,—see the track?

A. The distance.

769 Q. Have you got a rule which governs that?

A. Yes sir.

770 Q. Where is that?

A. I think it is in this book of rules.

Mr. Berge: We will let him look that over. The rule is in there though?

A. I think it is.

771 Q. Running under control means to stop as far as you can see. Then, if in rounding a curve you can see only 200 feet, it is your business to run so that you can stop in 200 feet?

A. That is what I would consider to be under control.

772 Q. And if you can see 500 feet it is your duty to stop 500 feet from the time?

A. Yes sir.

773 Q. That is under control?

A. That is what I would consider under control.

774 Q. Now, if a man is running northward, and he can see 200 feet ahead, he would be running under control if he could stop in that distance?

A. Yes sir.

775 Q. And if a man was running southward on the same track, looking 200 feet ahead, he would be considered under control, running that distance, that is correct, is it?

A. I don't know whether that is a catch question.

776 Q. No sir; it is a cold, big, clam-y question?

A. If you can take and see 200 feet, whether it is going around a curve or a straight track either way, it don't matter whether  
164 south or north, or either direction.

777 Q. The extra east, in this instance under discussion, this extra east is the one that should be able to stop within 200 feet?

A. (Not answered.)

778 Q. Don't the switch engine have to run under control in the yards?

A. No sir, not against this here extra.

779 Q. And the extra don't know that there is such a train in the yards?

A. He knows just as well as we do.

780 Q. Suppose two trains are both supposed to run under control, and the men can see 200 feet, there would be a collision at 100 feet, wouldn't there?

Mr. Holmes: The defendant objects to that question as immaterial and incompetent, not intelligible.

Question withdrawn.

781 Q. But running under control means to stop the distance that you can see on the track?

Mr. Holmes: The defendant objects as having been already answered.

That is all.

Recross-examination.

Examined by Mr. Holmes for the defendant:

782 Q. You mean to see the track clear?

A. Yes sir.

(By Mr. Berge:)

783 Q. Mr. Cavanaugh, when you are through with that book, I would like to see it?

Witness excused.

165 HOWARD B. EVANS, being produced and duly sworn on behalf of the plaintiff testified as follows.

Examined by Mr. Berge for plaintiff:

784 Q. Mr. Evans, what is your full name?

A. Howard B. Evans.

785 Q. Where do you live?

A. 2034 "S" Street, Lincoln.

786 Q. What is your occupation?

A. Telegraph operator.

787 Q. For what road.

A. Chicago Rock Island.

788 Q. How long have you been so employed.

A. At Lincoln, for about 16 months.

789 Q. Were you operator at Lincoln on December 8th, 1909?

A. I was.

790 Q. There is but one operator here, isn't there, for the Rock Island?

A. There is three operators.

791 Q. Are they all at the depot?

A. Yes sir.

792 Q. And you are one of them?

A. I am one of them.

793 Q. Did you have any rank between you, or all the same rank?

A. There is three tricks, split up by nine hours each.

794 Q. So far as your rank is concerned you are the same, only different times?

A. Yes sir.

795 Q. I now hand you exhibits "16," "17" and "18," and ask you to examine them and down where it says "operator" ask  
166 you to state whether those are in your handwriting?

A. Yes sir.

796 Q. That is the signature "Evans" is all in your handwriting?

A. Yes sir.

797 Q. And the body of the order, the clearance cards, are they in your handwriting?

A. Yes sir.

798 Q. And were they delivered to Mr. Wright that day?

A. They were delivered to extra #1486 east.

799 Q. Extra engine #1486 east?

A. Yes sir.

800 Q. Who was the engineer on that train?

A. Why, Mr. Wright, I believe.

801 Q. Were they delivered to him?

A. Personally.

802 Q. By you?

A. Yes sir.

803 Q. You know they were delivered?

A. Yes sir.

804 Q. When were they delivered to him?

A. 2:05 P. M.

805 Q. Mr. Evans, were you afterwards informed of the collision up north of Lincoln a little ways?

A. Yes sir.

806 Q. How were you informed, if you remember?

A. I believe through telephone.

807 Q. Do you know who it was that informed you?

A. No; I do not.

808 Q. Do you know the time when you was informed?

167 A. Not exactly, but it must have been near 2:20 or 2:30.

809 Q. Two-twenty or thirty. It was delivered to him at 2:05?

A. Yes sir.

810 Q. Have you any record as to when this collision occurred, the exact time?

A. No sir.

811 Q. Do you know where his engine was when you delivered this to him?

A. The engine was on in front of the passenger station.

812 Q. On which side?

A. On the east side.

813 Q. On the main line, the main track, I mean?

A. I don't remember whether they was or not.

814 Q. It was immediately east of the passenger station, the first track is the main line?

A. The first track is the main line.

815 Q. That day, do you know who was in charge of the switch engine?

A. No, that is out of my line entirely; I don't know.

816 Q. You did not have anything to do with the switch engine?

A. No sir.

817 Q. Did you know whether that day you told the switch crew about this extra train, #1486?

A. I don't remember doing so; no.

818 Q. When a first-class train extra goes through, don't you notify the switch engine of it, or does the switch engine have to keep posted itself?

A. Well, I could not say as to that, but I expect they are supposed to know.

(By Mr. Holmes:)

819 Q. Not your supposition, I object to the supposition  
168 about the matter, any fact I don't object to.

Sustained.

The plaintiff excepts.

820 Q. Have you got any fact about a circumstance of that kind, any rule that governs you?

A. I could not say as to that.

821 Q. Do you remember of Mr. Wright starting immediately after you delivered these orders to him, and that clearance card?

A. Yes sir.

822 Q. He walked right from your office to the engine and started?

A. Yes sir.

823 Q. You issued that clearance card to him?

A. Yes sir.

824 Q. It is in your handwriting?

A. Yes sir.

825 Q. And you saw him start immediately with his engine?

A. Yes sir.

Cross-examination.

Examination by Mr. Holmes for defendant:

826 Q. You frequently saw a switch engine in the yards, did you not?

A. Yes sir.

827 Q. There is one working there all the time?

A. Yes sir.

828 Q. You don't tell any trains about that switch engine, do you?

A. No sir.

829 Q. You did not receive any train orders in reference 169 to that switch engine, did you?

A. None only the time, on late first-class trains.

830 Q. And that is for the purpose of enabling the switch engine to avoid the first-class trains?

A. Yes sir.

831 Q. That is all the duty that the switch engine has got in that respect, is it not; they only have to look out and clear for first-class trains?

A. Yes sir.

832 Q. Ever since you have been working there for the Rock Island this switch engine occupies the yards, does it not?

A. Yes sir.

833 Q. When I use the term yard, what does that mean, Mr. Evans?

A. "Yard" is defined by limit boards.

834 Q. And what are the yards used for?

A. For the switching of cars, making up of trains.

835 Q. Making up of trains?

A. Yes sir.

836 Q. Unloading trains?

A. Yes sir.

837 Q. And all that kind of thing?

A. Yes sir.

838 Q. And the switch engine is necessary for that purpose?

A. Yes sir.

839 Q. Do you know what first-class trains are?

A. First-class trains are passenger trains usually.

840 Q. What other trains sometimes get into the first track?

A. None except those given rights, or classed by train orders.

841 Q. That is, you mean that once in a while some train  
170 will receive orders granting them rights over all other trains?

A. Yes sir.

842 Q. Passengers and fast freights and everything else?

A. Everything.

843 Q. And then that becomes a superior train or a first-class train?

A. Yes sir.

844 Q. There was not any orders came to you on December 8th, granting to this extra engine that was running through the yards right over all other trains, was there?

A. No, sir.

845 Q. Mr. Evans, where are the yard limits in Lincoln, do you know?

A. There is one near the "A" street pumping station.

846 Q. On the south?

A. On the south. As to the other one I could not say.

847 Q. You don't know just where that is?

A. No sir.

848 Q. Have you ever gone out the line north?

A. Why, I have walked down as far as the Fair Grounds.

849 Q. Well, the yard limits are beyond that point?

A. They are, yes sir.

850 Q. You don't know how far out beyond the Fair Grounds?

A. No, I don't.

851 Q. The yard limits are beyond, they are east of the "O" Street Viaduct, are they not?

A. Yes sir.

852 Q. And you don't know how far east?

A. I do not.

853 Q. Do you know where the accident occurred on the  
171 8th day of *day* of December?

Mr. Berge: The plaintiff objects as not cross-examination.  
Sustained.

The defendant excepts.

854 Q. Mr. Berge asked you if you heard of this collision; who sent you the word, Mr. Evans?

A. I don't know who it was.

(By Mr. Berge:)

855 Q. A Lady, wasn't it?

856 Q. And did they say where the accident occurred

A. They said it was near the Holdrege Street Viaduct.

857 Q. And that was all?

A. That was all.

858 Q. Did you go up there?

A. No sir.

## Redirect examination.

Examined by Mr. Berge for plaintiff:

859 Q. In response to a question by Judge Holmes you said that you did do something with switch engines, when certain kinds of trains went through Lincoln; now what kind were they?

A. First-class trains.

860 Q. What did you do with the switch engines, then?

A. Gave them time on those first-class trains, providing they are late.

861 Q. Gave who time?

A. The switch engine, the switch crew.

172 862 Q. Who is the man in the switch crew, the engineer?

A. Engineer and fireman, on the switch engine.

863 Q. Who is the captain of the switch engine?

A. The switch foreman, the yard foreman.

864 Q. And you gave him time on first-class trains if they are not running on time?

A. Yes sir.

865 Q. Do you do that by written orders?

A. By written telegraph orders, yes sir.

866 Q. And the rest of the time you paid no attention to the switch engine?

A. Yes sir.

867 Q. Did you give any oral orders to any other train?

A. Occasionally.

868 Q. Occasionally, what kind of an occasion is that

A. Well, on second class or fast freight trains we sometimes give them a line up or tell them when we expect them.

869 Q. Well, you do that under directions as a part of your duty or voluntarily?

A. No sir; just voluntarily.

870 Q. And they frequently consult you?

A. Yes sir.

871 Q. About trains?

A. Yes sir.

872 Q. Did you on this particular day tell the foreman of this switch engine that extra #1486 was in the yards and going north?

A. No sir.

873 Q. You ordinarily know the whereabouts of the switch engine?

A. No sir.

874 Q. —

173 875 Q. Did you know where the switch engine was this particular day?

A. I did not.

876 Q. On this particular time?

A. No sir.

877 Q. But you gave him a clearance card?

A. Yes sir.

878 Q. That means that he had got all of his orders?

A. He had got his orders.

879 Q. Until the next station?

A. Yes sir.

880 Q. How?

A. Yes sir.

881 Q. Did you know Mr. Wright personally?

A. No sir.

882 Q. Ever seen him before this particular day?

A. No, I can't say that I did.

Recross examination.

Examined by Mr. Holmes for defendant:

883 Q. You cannot say that you did not see him?

A. No.

884 Q. You just don't remember?

A. I don't remember seeing him.

885 Q. When you gave this clearance card as Mr. Berge calls it, what did it mean?

A. It meant that *that* I had no more orders at my station for him.

174 886 Q. That is all it did mean?

A. Yes sir.

887 Q. That did not mean that he could jump on his engine and go out of the yards without obeying rules, did it?

A. No.

888 Q. Do you know what the rights of the switch engine were in that yard?

A. I don't know.

889 Q. You don't know about that?

A. It is out of my line?

890 Q. That is in the freight department, is it?

A. Yes sir.

891 Q. I mean the operator's department.

A. Yes sir.

Redirect examination.

Examined by Mr. Berge for plaintiff:

892 Q. But you know that a man when you gave him a clearance card, has a right to start?

A. As far as the orders at my station have to do with his train, he has a right to start.

Witness excused.

175 ANDREW J. WISTROM, being produced and duly sworn on behalf of the plaintiff, testified as follows.

Examined by Mr. Berge for the plaintiff:

893 Q. What is your full name?

A. Andrew John.

894 Q. Andrew John Wistrom?

A. Yes sir.

895 Q. Where do you live?

A. 1720 Holdrege.

896 Q. 1720?

A. Yes sir.

897 Q. Where is that with respect to the Holdrege Street Viaduct?

A. West side, west end.

898 Q. Which side of the Viaduct?

A. North side.

899 Q. Which side of the Rock Island track?

A. West.

900 Q. How far north of the viaduct do you live?

A. Why, just a few feet.

901 Q. A few feet, about how many feet?

A. I don't know; the street goes pretty near right past the house.

902 Q. 10 or 15 feet from the viaduct, your house is?

A. Why, it is——

903 Q. 25 feet?

A. 25 or 30.

904 Q. Your house stands that far from the Viaduct?

A. Yes sir.

905 Q. How far is your house west of the Rock Island track?

A. Oh, some 200 or 300 feet.

176 906 Q. Did you live there Mr. Wistrom on December 8th, 1909?

A. Yes sir.

907 Q. Are you a man of a family?

A. Yes sir.

908 Q. And have you children in the family?

A. Yes sir.

909 Q. Grown up?

A. No.

910 Q. Small children?

A. Small.

911 Q. Now state whether you were at home on December 8th, 1909, in the afternoon?

A. Yes, I was at home.

912 Q. Do you remember of the collision that took place on the Rock Island track that day?

A. Yes sir.

913 Q. And what time in the afternoon was it?

A. I don't remember, I don't remember.

914 Q. Do you remember the condition of the weather at that time?

A. Why, it was cold; it was a clear day, though.

915 Q. A little louder.

A. It was a clear day, but awful cold, lots of snow.

916 Q. You say there was snow on the ground?

A. Yes, a good deal of snow.

- 917 Q. A good deal of snow?  
A. Yes sir.
- 918 Q. State whether you went over to the place of the collision, after the collision took place?  
177 A. Why, they came and wanted us to telephone.
- 919 Q. Well, did you go over there?  
A. Yes sir.
- 920 Q. Before you went over did you telephone to anybody?  
A. Yes, my wife did.
- 921 Q. Your wife did?  
A. Yes sir.
- 922 Q. And how did she come to do that?  
A. Why, there was some man came and asked if he could not telephone that there was a man pinned in on the engine.
- 923 Q. And do you know who she telephoned to?  
A. Why, the Rock Island depot.
- 924 Q. At the depot?  
A. Yes sir.
- 925 Q. Did she telephone?  
A. Yes sir.
- 926 Q. And then, when you went over there you may state whether Mrs. Wistrom, your wife, went with you?  
A. Yes, she did.
- 927 Q. Are you a little hard of hearing?  
A. Yes sir.
- 928 Q. That is the reason I am talking loud; which way did you go in order to reach the place of the collision?  
A. Right straight east.
- 929 Q. And you had to go about how many feet?  
A. Why, between 200 and 300 feet.
- 930 Q. You may state whether or not you heard the noise of the collision?  
A. I did not, not to hear that, but my wife, I guess, did. I am awful hard of hearing.
- 178 931 Q. Did you go over before your wife telephoned or did you go over afterwards?  
A. Afterwards.
- 932 Q. Did you know of the collision before these men came there?  
A. We could see from the house, from the window, we could see the man pinned right in the door, right in front of the window.
- 933 Q. You say you went straight east?  
A. Yes sir.
- 934 Q. How close to the engine did you go?  
A. Why, I was about 20 or 30 feet.
- 935 Q. And you came up to the end of the embankment did you, where the embankment was?  
A. Yes sir.
- 936 Q. Stood on the embankment?  
A. Yes sir.

937 Q. And in standing on the embankment which way would you look?

A. East.

938 Q. Looked east; you say you had come across from your house?

A. Yes sir.

939 Q. Were the engines standing still at that time?

A. Yes sir.

940 Q. State whether there was considerable smoke around there or not?

A. Why, no, not very much smoke.

941 Q. State whether there were many people around there?

A. Why, not very many people then, but there came more right away.

942 Q. How long were you there, Mr. Wistrom?

A. Why, I was there about 20 minutes.

179 943 Q. Did you stay on the embankment?

A. Why, I walked back and forth a little up along on the bank.

944 Q. Could you see Mr. Wright?

A. Yes sir.

945 Q. You may tell the jury just where you saw him?

A. He was facing right west and asking the boys to warm his hands.

946 Q. Facing west, was he standing up?

A. Yes, he was pinned so he could not stoop over or anything. He was pinned right in through here (Indicating) and one of his legs or feet was pinned in.

947 Q. How far up on his body?

A. He was pinned right about in there, right across the hips (Indicating).

948 Q. You heard him talk?

A. Yes, I heard him ask the boys to warm his hands.

949 Q. Now, will you tell the jury whether he was taken out while you were there?

A. No, he was not.

950 Q. In there the whole time?

A. They could not get him out until the Police came; they was the only ones that could get him out.

951 Q. Tell the jury what your best judgment is, how far north of the viaduct it was?

A. Why, I should think it ain't much over a hundred feet, if it is that much; he was right in the worst curve in the cut.

952 Q. Did you go away before he was taken out?

A. Yes, I had to.

180 953 Q. And do you know how long after it was when they got him out?

A. Why, it was quite a while, he was there about close to an hour from the time the trains went together until they got him out.

954 Q. Now, can you describe, Mr. Wistrom, the conditions of the coal car on Mr. Wright's engine with respect to the rest of the engine, whether it was intact in its place, or how it was?

A. Why, no, that is why he got caught there, when the engine from the north came, they had more force to come down the hill, than he had from the south and it shoved the whole tender all loose about 8 inches I should judge, and slid. If that tank would not have slid he would have got out all right, but it was all loose and the water came out and ran on his legs.

955 Q. Then as I understand you the coal car or the water tank slipped forward?

A. Forward.

956 Q. Slipped forward how much?

A. About 6 or 8 inches, or maybe more, that is what I judge at the time.

957 Q. You say you went away after about 20 minutes, did you come back?

A. No, I did not come back.

958 Q. That day?

A. No, I did not go back near the track, as I was not feeling so I could.

959 Q. Did you examine the next time, the engine?

A. No.

960 Q. You think you walked straight east when you left  
181 your house, after the accident?

A. Yes, not over 10 feet north, if there was any.

961 Q. How?

A. If there was any north, it was not over 10 feet; it was right straight east.

962 Q. In your best recollection, how far north of the viaduct does your house stand?

A. Why, it is hard on that curve there to just -ell, I never measured it; it cannot be over 150 from the fence down.

963 Q. You mean from the fence above?

A. Yes, the fence on the viaduct.

964 Q. But right straight across from the bottom of it, how far is your house north?

A. The grade goes pretty near out to the house.

965 Q. The grade of the track?

A. Yes sir.

966 Q. Of the viaduct?

A. Yes sir.

967 Q. Is your house in the *same* place now it was then?

A. Yes sir.

968 Q. And by observing the house now, it stood in the same place December 8th, 1909?

A. Yes sir.

969 Q. And you think in going eastward you did not go ten feet north?

A. No, the road *crosses* there at the railroad right at the track.

970 Q. Did you hear Mr. Wright say anything except what you have said?

A. No, I did not pay any attention to that.

## 182 Cross-examination.

Examined by Mr. Holmes for the defendant:

971 Q. Mr. Wistrom, will you take that map, that is supposed to represent the viaduct (Indicating) will you take your pencil and mark on there where you live now (Witness indicates) This would be west,—this is the Rock Island track, going along the viaduct. Now you mark where you live?

A. I lived close to the Northwestern tracks.

972 Q. How close did you live to the Northwestern tracks?

A. Just right by the tracks.

973 Q. Right up there?

A. Yes sir, right up.

974 Q. North of the viaduct?

A. Yes sir.

975 Q. About ten feet north of the viaduct?

A. About ten feet north of the viaduct, no, there is just about 10 feet between the house and the grade of the Northwestern.

976 Q. Well, here is the Northwestern?

A. Then the house stands just between the viaduct and the Northwestern.

977 Q. So you think you lived here somewhere?

A. Well,—

978 Q. If you cannot show, how many feet west of the viaduct, did you live?

A. North.

979 Q. How many feet north of the viaduct did you live?

A. Why, it cannot be over 100 feet from the fence.

183 980 Q. You lived north of the viaduct 100 feet?

A. Yes sir.

981 Q. Now, how far west from the viaduct did you live?

A. Why, I did not live west of the viaduct.

982 Q. You are not west at all?

A. No, I am north; it runs east and west there.

983 Q. And you live, north over on the Northwestern?

A. Yes sir.

984 Q. And you think it is now only 100 feet over there?

A. It cannot be much more.

985 Q. How far was it, do you think from the place of the accident?

A. Well, I don't know how many feet; it ain't far over, just a little piece of land between there.

986 Q. Which way does your house face?

A. Why, east and west.

987 Q. It faces the west?

A. East and west.

988 Q. How long have you lived there?

A. It is a year in October.

989 Q. What is your business?

A. I was Coach cleaner.

990 Q. What?

A. Coach cleaner.

991 Q. You were not working this day?

A. No, I have not worked any for 17 or 18 months.

992 Q. You had not worked?

A. No sir.

993 Q. And you and your wife were home there?

A. Yes sir.

994 Q. And some man came to the house and wanted you  
184 to telephone about this accident?

A. Yes, asked my wife and wanted them to telephone themselves, offered them the telephone and he would not.

995 Q. Offered them the telephone, and they told you there had been an accident?

A. Yes sir.

996 Q. Then you went over, did your wife go to?

A. No, we did not go over right away.

997 Q. No, you went over after a little bit?

A. Yes sir.

998 Q. When you got there there was a few people there?

A. Yes sir.

999 Q. And they were doing all they could do for Mr. Wright the engineer?

A. No, there was not anything doing, anything; they did not have anything to do with.

1000 Q. They did not have anything to do with?

A. No.

1001 Q. Were any of them up there with him?

A. Yes sir.

1002 Q. They were all around him?

A. Yes; on the bank.

1003 Q. Trying to help him up and all that?

A. No.

1004 Q. What was they doing?

A. Just around looking.

1005 Q. Just standing around looking?

A. Yes sir.

1006 Q. You saw the train men there, didn't you?

185 A. Yes sir.

1007 Q. And you heard the train men say that they did not have anything to get the man out?

A. They came over and asked me before I went to get a log chain; wanted to know where they could get one to pull the coal tender back.

1008 Q. A log chain?

A. Yes sir.

1009 Q. Did you see any men running around there, going over to the Northwestern or something, of the kind to see if they could get something?

A. Yes sir.

1010 Q. Who did that, do you know?

A. I don't know who it was, some of the train men, but they did not get any.

1011 Q. You say that Mr. Wright was pinned in there, caught in there, was he, could not get out?

A. Yes sir.

1012 Q. You saw that the train men there could not get him out?

A. No, they could not get him out.

1013 Q. They could not get him out?

A. No.

1014 Q. They would have got him out, if they could, wouldn't they?

A. Why, yes. They could not.

1015 Q. Then you went over there about 20 minutes?

A. Yes, I was over there about 20 minutes.

1016 Q. It was a pretty cold day?

A. Yes sir.

1017 Q. And a good deal of snow?

A. Yes sir.

186 1018 Q. Whereabouts in the house were you when these men came?

A. I was in the front room.

1019 Q. In the front room, that would be in the west room?

A. No, east.

1020 Q. The house faces east?

A. Why, it stands east and west.

1021 Q. And the back door would be at the west?

A. No it is east, there is one door on the south and one on the east.

1022 Q. The back door would be at the east and the front door on the west?

A. On the south.

1023 Q. So, it faces south and east. Do you own that property?

A. No.

1024 Q. Your house is on the Northwestern right-of-way?

A. It is the Northwestern section house.

1025 Q. How?

A. It is the Northwestern section house.

1026 Q. You live in the Northwestern section house?

A. Yes sir.

1027 Q. And you live right up close to the track?

A. Yes sir.

1028 Q. And you think it is 100 feet north of the viaduct?

A. Just about.

1029 Q. And how far is it from the Burlington?

A. Oh, I don't know, that is quite a ways.

1030 Q. What would you say, it was 200 or 300 feet?

A. Well, that is about, to the Rock Island.

1031 Q. How?

187 A. Up to the Rock Island.

1032 Q. The Rock Island is 200 or 300 feet from your house?

A. Maybe more than that, I could not say.

1033 Q. Haven't you been saying that your house was only 100 feet from the Rock Island?

A. No, from the viaduct.

1034 Q. But your house is 200 or 300 feet from the Rock Island track?

A. Yes sir.

1035 Q. And maybe more?

A. Yes, I could not say, I never measured it.

1036 Q. And the track there goes through a cut, don't it?

A. Yes sir.

1037 Q. Quite a deep cut, you cannot see the track from your house?

A. No, not the track.

1038 Q. How do you happen to be living at the Section house on the Northwestern?

A. Why, we rented that.

1039 Q. Did you rent the section house?

A. Yes sir.

1040 Q. A Section foreman did not live there?

A. No sir.

1041 Q. And after your attention has been called to this by the men that came to telephone, you went out doors?

A. Yes sir.

1042 Q. And you could see over there where the accident happened?

A. I could see the man right from the window.

1043 Q. From your window you could see the man fastened in between?

A. Yes sir.

1044 Q. And from that window the place where the accident was, how far would you say that was now?

188 A. Well, about 300 feet.

1045 Q. You did all you could do while you were there for Mr. Wright?

A. I could not do anything.

1046 Q. Why not?

A. Why, I was crippled and am a cripple yet today.

1047 Q. And on account of your infirmity you was not able to do anything?

A. No.

1048 Q. Well, if you had been strong and able bodied was there anything you could do?

A. Why, no, not until they got the jacks there.

1049 Q. The jack screws?

A. Yes sir.

1050 Q. That was necessary in order to move the tank back?

A. No, they raised the step.

1051 Q. What?

A. They raised the engine right at the steps with jacks, and the water was running out there, and no body wanted to get in the water, until the police came, he stepped right into the water.

1052 Q. Now, far do you think it was Mr. Wistrom, from the

viaduct where the accident happened, where the engines came together?

A. Well, I don't know, it can't be much over 100 feet.

1053 Q. Much over 100 feet?

A. Yes sir.

1054 Q. Can you take these figures, exhibit "8," would that enable you to—do you recognize that place there?

A. No. Where is the viaduct there?

1055 Q. Well, it is down here (Indicating)?

A. Why, the engines came together at the first post north  
189 of the viaduct.

1056 Q. What?

A. At the first telephone post north of the Viaduct, that is where they went together.

1057 Q. On which side of the track was the telephone post?

A. It is on the east side.

1058 Q. Now, take this picture, No. 7, that is taken from the point 200 feet north of the viaduct, now do you recognize that place; can you locate the place of the accident on either one of these pictures?

A. There, (Indicating) that must be the telephone post. No, it is not in there, because you cannot see that in the picture there.

1059 Q. Now, let us go back to this here (Indicating.) Do you recognize that house, did you ever see it?

Mr. Berge: It is not a house.

A. It is a barn.

By Mr. Berge:

1060 Q. Do you think that was that barn?

A. Yes sir.

1061 Q. Whose barn is that?

A. That belongs to Mr. Barchar.

1062 Q. Where do you live from that barn?

A. A little bit south and west.

1063 Q. Is that the roof of your house over there? (Indicating.)

A. No.

1064 Q. Can you take this picture, exhibit "4" and locate your house in it, this is the viaduct as you go north?

A. Why, the Northwestern section house is not there.

1065 Q. You cannot see, I know, but there is the viaduct?

190 A. Yes sir.

1066 Q. Now, can you tell me where your house is?

A. That is east.

1067 Q. That is east, this would be west?

A. The Northwestern section house—

1068 Q. They don't show, but they are on the other side of the viaduct?

A. They are over on this side. (Indicating.)

1069 Q. Over to the other side of the viaduct, would not that be?

A. That south?

1070 Q. No; this would be south, this is looking north, we are south looking north.

A. Well, then, it would be on the other side.

1071 Q. On the other side of the viaduct?

A. Right over in there. (Indicating.)

1072 Q. Now, how far, let us see, here would be about the end of the bridge or viaduct, wouldn't it, right about there. (Indicating.) This would all be dirt. Does your house come even with the end of the bridge or come up over there?

A. No, it is down at the bank, at the side of the bank, of the grade.

1073 Q. Is that low ground there?

A. Yes sir.

Redirect examination.

Examined by Mr. Berge for the plaintiff:

1074 Q. Wistron, the place you say as I understand you of the accident was about at the first telephone pole on the east  
191 side of the track?

A. Why, the telephone on the north on the north side, and the telephone is on the east side.

1075 Q. North of the viaduct and east of the Rock Island tracks?

A. Yes sir.

1076 Q. Now, Mr. Wistrom, calling your attention to exhibit "8," suppose we are looking northward now, standing right under the viaduct, looking northward. The viaduct is right here, only up above. Is this the telephone pole you referred to? (Indicating.)

A. Yes sir.

1077 Q. That telephone pole is immediately south of the barn that Judge Holmes called a house?

A. Yes, it is.

1078 Q. And where do you say the accident occurred with reference to that telephone pole?

A. Just opposite from that telephone pole

1079 Q. Opposite which way, west?

A. Yes sir.

By Mr. Holmes:

1080 Q. That would be about there, (Indicating)?

Mr. Berge: He has stated; wait until I get through.

1081 Q. Well, immediately west of that telephone pole?

A. Yes sir.

1082 Q. And do you remember, Mr. Wisyrom, if the telephone pole stood over here, whether the two engines were in the center here, or whether they were south of it or north of it, or about how with respect to that telephone pole,—two engines you know would cover a distance of more than—do you know how long an  
192 engine is?

A. Why, no, it is different according to the size of them.

1083 Q. Why, they run 25 feet long, the engine and the water tank?

A. I don't know.

1084 Q. Where was the collision, the two engines with respect to that pole, was it just opposite or southward a little or northward a little?

A. Where he was pinned in was just opposite of that telephone pole.

1085 Q. Where you stood over here on this bank, the west bank you think he was between you and the telephone pole?

A. He was right opposite that telephone post, that first post from the viaduct, north.

1086 Q. From where you stood?

A. Yes sir.

1087 Q. Then, he would be between you and the telephone pole?

A. Yes sir.

1088 Q. Tell the jury whether this embankment on the west side here, is as high as the one on the east side?

A. No, it is not.

1089 Q. All around here lower?

A. It is all lower.

1090 Q. Judge Holmes asked you about whether they could do anything until the policeman came, and the jacks, with the chains, did they do anything, did anybody do anything to get him out?

A. They did not have anything to do anything with until they got the jacks.

1091 Q. Then, there was not anything done?

193 A. No.

1092 Q. You say they did not want to get in the water?

A. It looked that way.

1093 Q. You say the police went in?

A. Yes sir, they had tried before the police came and could not do anything.

1094 Q. Whereabouts was the water running with respect to where Wright was?

A. It ran right over his legs.

1095 Q. Right down here? (Indicating.)

A. Yes sir.

1096 Q. Coming from the water tank?

A. Yes sir.

1097 Q. And shooting out?

A. Shoooting out.

1098 Q. Cold water?

A. Cold water; yes sir.

1099 Q. Then, you say they pried up the engine here?

A. Yes sir.

1100 Q. Or the coal car?

A. They pried up right under the steps there.

1101 Q. Under the steps of the engine?

A. Yes sir.

1102 Q. And that would open up the top?

A. Yes sir.

1103 Q. And this would get him out?

A. Yes sir.

1104 Q. Did they throw both the coal car and the engine up?

A. Why, they had to raise the coal tender.

194 1105 Q. Just a word, Mr. Wistrom, when you stood over here on this embankment and looked eastward and Mr. Wright was in between you, was there a telephone pole on this side, too?

A. No, not on the west side.

1106 Q. You don't remember that——

Recross-examination.

Examined by Mr. Holmes for defendant:

1107 Q. How far do you say it was from the viaduct to the place of the accident?

A. About 200 feet.

1108 Q. 200 feet from the viaduct?

A. Yes sir.

By Mr. Berge:

1109 Q. The question — how far north of the viaduct——

Mr. Holmes: Aren't you going to let me cross examine?

1110 Q. You don't know whether that is the first telephone pole or not, do you; in this picture from the viaduct?

A. Why, I don't.

1111 Q. No?

A. Why, there is a telephone company got some posts there.

1112 Q. You said to Mr. Berge that this pole here in this picture was the first telephone pole. Now, you don't know whether that is the first one or not, do you; it is the first one you saw here in this picture, but you don't know whether it is the first one from the viaduct or not?

A. No sir.

195 Redirect examination.

Examined by Mr. Berge for plaintiff:

1113 Q. But the one you stood opposite of, is the first one north of the viaduct on the east side of the Rock Island track?

A. On the Rock Island track.

1114 Q. On the east side, of the track I mean?

A. Yes sir.

1115 Q. It is the first telephone pole north of it?

A. Yes sir.

1116 Q. That you stood opposite?

A. Yes sir.

Witness excused.

It now being 5 o'clock P. M. Wednesday, March 15, 1911, Court adjourned until tomorrow morning, at 9:30 A. M. March 16th, 1911.

9:30 A. M., March 16th, 1911.

Court met pursuant to adjournment and the following proceedings were had and done.

196 ALMA C. WISTROM, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for the plaintiff:

1117 Q. What is your full name?

A. Alma C. Wistrom.

1118 Q. Alma C.?

A. Yes sir.

1119 Q. Are you the wife of the witness who was on the stand last night?

A. Yes sir.

1120 Q. Where do you live Mrs. Wistrom?

A. In the Northwestern section house.

1121 Q. Do you live there now?

A. Yes sir.

1122 Q. Did you live there on December 8th, 1909?

A. Yes sir.

1123 Q. Mrs. Wistrom, the viaduct, that viaduct that crosses over the right-of-way of the Rock Island, is that straight with the approach, runs down,—does the approach run down straight or does it slant?

A. It curves.

1124 Q. What curved?

A. The approach.

1125 Q. Of which side of the viaduct are you speaking now?

A. The west side of the viaduct.

1126 Q. The viaduct over the road bed of the Rock Island itself, what direction does the viaduct go?

A. Why, east and west.

1127 Q. Is it about straight east and west?

197 A. I think about straight, it might not be exactly but I think it is about east and west.

1128 Q. Now, then, you say that the approach from the west side throws which way, north or south?

A. South.

1129 Q. The bottom end of it is south?

A. Yes sir.

1130 Q. And is there not an incline there?

A. Yes sir.

1131 Q. Now, Mrs. Wistrom, I wish you would tell the jury as near as you can how far north of the viaduct that part of the viaduct that crosses over the track, how far north of that part of the viaduct, your house is?

A. The house itself stands about 20 feet north of the line even with the viaduct.

1132 Q. That is with a line that crosses the track?

A. Yes sir.

1133 Q. How far is the house from the approach down, immediately south of it?

A. It would depend on which part of the house you would measure from.

1134 Q. Suppose you take the house and got right straight over to the bridge?

A. I can't say just exactly how far.

1135 Q. It is farther than it is over?

A. Yes; it is much farther.

1136 Q. You say it is a good deal farther, much farther?

A. Yes sir.

1137 Q. It is just that much farther, isn't it, as the approach swings around to the south?

A. Yes sir.

1138 Q. How far west of the Rock Island tracks is the house that you live in, how far south?

A. Well, I think about 200 feet.

1139 Q. Mrs. Wistrom, on December 8th, 1909, was you at home?

A. Yes sir.

1140 Q. In the afternoon?

A. Yes sir.

1141 Q. You remember of the collision there in the cut?

A. I do.

1142 Q. Where were you at the time?

A. I was in the house in the kitchen.

1143. You may state whether you knew of it before you saw it?

A. No sir.

1144 Q. Did you hear it?

A. No sir.

1145 Q. How did you first find it out?

A. A man came to the door and asked me to telephone about it.

1146 Q. Do you know who he was?

A. No sir.

1147 Q. A stranger to you?

A. Yes sir.

1148 Q. Telephoned to the——

A. He asked me to telephone to somebody, he did not know who to telephone to, so I telephoned to the Rock Island depot.

1149 Q. A little louder please?

A. I telephoned to the Rock Island depot.

1150 Q. You did the telephoning yourself?

A. Yes sir.

1151 Q. What did you tell them?

A. Why, I told them that there was a wreck on the Rock Island out by the viaduct, that went over their track on Holdrege

Street, and that is what the man told me, he did not know that anyone was hurt when he told me.

1152 Q. At that time had you seen the wreck?

A. No sir, I did not look out at all until I went right to the telephone.

1153 Q. What is your best recollection, Mrs. Wistrom, as to the time of the day?

A. Well, I did not notice just what time, but it was shortly after 2 o'clock, I don't know just exactly the time.

1154 Q. After telephoning what did you do?

A. I went out to where the wreck was, to where the wreck occurred.

1155 Q. Went right over there?

A. Yes sir.

1156 Q. And did you observe the place where the accident took place?

A. Yes sir.

1157 Q. Where the engines were with respect to the viaduct?

A. Yes sir.

1158 Q. And was it north or south of the viaduct?

A. North.

1159 Q. And how far north, in your judgment?

A. I think about 100 feet, I don't think it was much over 100 feet, if at all, north of the viaduct.

1160 Q. You mean north of the north side of the viaduct?

A. Yes; north of the north side of the viaduct.

1161 Q. Did you go clear up to the engine?

200 A. I did not go down the bank. I stood on the bank.

1162 Q. Which bank?

A. The west bank.

1163 Q. You may state Mrs. Wistrom, whether the west bank was as high as the east bank?

A. Where I was standing it was not, but where the wreck occurred I think it is very nearly the same.

1164 Q. And how far was you from the engine?

A. Well, I can't tell just exactly.

1165 Q. Well, much farther than where you are sitting from where I am?

A. I think it was farther.

1166 Q. Well, was it as far as the railing *back* here?

A. Well, I can't say, I don't believe it was quite as far as to the railing.

1167 Q. Well to the end of this table?

A. Well, I don't know.

1168 Q. Could you approximate it in feet, how far you were from the wreck?

A. Well, not exactly.

1169 Q. What about, of course, I would not expect you to give it accurate, 15 or 20 feet?

A. Well, I think about 20 feet.

1170 Q. When — got over there, Mrs. Wistrom, were there any other people there?

A. Why, there were a few when I went over there, but mostly the train men.

1171 Q. Mostly train men?

A. Yes sir.

1172 Q. You may state whether you saw Mr. Wright?

201 A. Yes sir.

1173 Q. And where did you see him?

A. In the engine in the cab of the engine.

1174 Q. And his engine, the one that he was on, which way was it facing?

A. It was facing the north.

1175 Q. Another engine there?

A. Yes sir.

1176 Q. Where?

A. Well, it was north of that.

1177 Q. Facing which way?

A. South; well, I don't remember whether it was south or not; it was a big engine but I did not notice its particular make, but it was coming south.

1178 Q. It was coming south?

A. Yes sir.

1179 Q. Did you observe the relation of the two engines?

A. I did not notice other engine.

1180 Q. Was there anything being done, Mrs. Wistrom, while you were there, to take Mr. Wright out?

A. Why, just as soon as the men came to help, they were at work, there was nothing much they could do until they got something to work with. They did try to get him out of there.

1181 Q. The men, what men?

A. They were men that came up from the Rock Island, and the police came up there, I don't remember which was there first.

1182 Q. Were you there when Mr. Wright was taken out?

A. No sir. I went away before.

202 1183 Q. Did you go away when your husband went?

A. I went away before my husband went; they went to look for a chain, they thought there might be one at our place, the Northwestern house.

1184 Q. To help look for a chain?

A. Yes sir.

1185 Q. At the Northwestern section house. That is, the place where you were living?

A. Yes sir.

1186 Q. Did you get a chain?

A. No sir, we did not.

1187 Q. Did you go back?

A. He went on over to the Burlington, I don't know whether he got any there or not; I went back after he went on.

1188 Q. That is, you went to your place there hunting for the chain and could not find any then?

A. Yes sir.

1189 Q. And he went to the Burlington?

A. Yes sir.

1190 Q. And you went back to the wreck?

A. Yes sir.

1191 Q. When you got back to the wreck did you see Mr. Wright?

A. Yes sir.

1192 Q. Was he still in there?

A. Yes sir.

1193 Q. Were you there when they finally did take him out?

A. No sir.

1194 Q. Do you know when they did take him out?

A. No sir; I don't.

1195 Q. So far as you do know that he was in there, how long was he in there, about what time?

A. Well, about half an hour that I was there.

1196 Q. A half an hour that you were there all together?

A. Well, I was not there all the time, I was gone part of the time.

1197 Q. A part of the time you were away?

A. Yes sir.

1198 Q. From the time you first went there until you went away the last time?

A. Yes sir.

1199 Q. About half an hour?

A. Yes sir.

1200 Q. Which way was Mr. Wright facing?

A. West.

1201 Q. Was he standing straight?

A. I think about straight, he was standing up, it looked as if he was just getting ready to jump out of the engine, when he was caught.

1202 Q. Did he have control of himself, his head?

A. His head and arms.

1203 Q. Did you hear him say anything?

A. Yes sir.

1204 Q. What did you hear him say?

A. He asked them to warm his hands, his hands were cold.

1205 Q. And was there anything being done during the time you were over there, either time about taking him out, actually?

A. Yes sir.

1206 Q. What did they do?

A. Well, after they got the jacks to work with,—I don't understand.

1207 Q. They did finally get the jacks?

A. Yes, working with them, and before they got them I saw some men try to pull him out of the engine.

1208 Q. Take hold of him and try to pull him out?

A. Yes; but they could not move him and gave it up. I heard him speaking to the men but I did not hear what he said.

1209 Q. But he was talking some?

A. Yes sir.

1210 Q. Now, Mrs. Wistrom, from what you saw around there, state whether they had, so far as your observation and knowledge goes, whether they had any tools or apparatus to take him out right away when you got there?

A. Not when I first got over there.

1211 Q. Did they seem to be hunting some?

A. They seemed to be waiting for some one to come up, then; I went over just as soon as I telephoned.

1212 Q. Mrs. Wistrom, how long had you lived there at that place prior to that?

A. Why, about two months.

1213 Q. How long did you say you lived there before that?

A. About two months; we moved there some time in October.

1214 Q. Where did you live before that?

A. On North 22nd.

1215 Q. How far from this viaduct?

A. About five blocks.

1216 Q. Which way?

A. Well, four blocks east and one north.

1217 Q. You would be on the other side?

A. Yes sir.

205 1218 Q. Mrs. Wistrom, do you know of other collisions at that place. Answer "yes" or "no"?

A. Yes sir.

Mr. Holmes: The defendant moves to strike that answer out, as incompetent, irrelevant & immaterial.

Sustained.

The plaintiff excepts.

1219 Q. Mrs. Wistrom, could you say here in this question for half an hour?

A. I can say until 11, just so I get away before 11.

Mr. Berge: Let the record show I will withdraw that question for the present until I can get one of my other witnesses.

1220 Q. Now, Mrs. Wistrom, did you see Mr. Wright after you went away the second time?

A. After I went away the second time. No sir.

1221 Q. Then the two times that you have testified about here, are the only two times you were there?

A. Yes sir.

1222 Q. While he was in the wreck?

A. Yes sir.

1223 Q. I now hand you exhibit No. "8," and will ask you to look at it, and I will say to you that this picture, you are looking northward?

A. Yes sir.

1224 Q. And it begins right at the north side of the viaduct. Now, over on the right side, looking northward, on the east side of the Rock Island track, do you know of some building being over there?

A. Yes.

- 1225 Q. Who lived there?  
206 A. Mr. Mitchell.  
1226 Q. Were those buildings there on December 8th, 1909?  
A. Yes sir.  
1227 Q. Now, with respect to the place of the collision, you may tell the jury whether the collision was north or south of the buildings.  
A. I think the collision was just south of the buildings.  
1228 Q. South of the buildings?  
A. Yes, the engine stood here, I think.  
1229 Q. When you say "here," of course we cannot tell exactly, but state it with respect to the buildings, you say it is a little south of the buildings?  
A. Yes sir.  
1230 Q. Were both engines south of the buildings?  
A. I can't say whether the engine farthest north was south or not; I think it was about opposite of the buildings.  
1231 Q. The engine farthest north?  
A. Yes sir.  
1232 Q. Then Mr. Wright's engine would be south of the buildings?  
A. Yes, it was south.  
1233 Q. Did you observe anyone talking with Mr. Wright and someone telling him not to talk to him?  
A. Yes sir.  
1234 Q. Do you know who they were?  
A. I think it was a newspaper reporter.  
1235 Q. Do you know who it was?  
A. I don't know, but I am not sure.  
1236 Q. But you saw that?  
A. Yes sir.  
207 1237 Q. And when the jacks were used, who was it that did the real work there, as far as you saw?  
A. Well, I did not know any of the men that were working there, but some of the policemen were at work there. I noticed one, but I don't know the other men.

#### Cross-examination.

Examined by Mr. Holmes for the defendant:

- 1238 Q. How do you arrive at the time, Mrs. Wistrom, when you telephoned?  
A. Well, it was, I noticed, some time afternoon.  
1239 Q. Had you observed the clock just before you telephoned?  
A. N-, I did not look at the clock, but our dinner was over and our work done up, and that was about the time.  
1240 Q. And what hour do you put it now?  
A. Why, some time after two o'clock.  
1241 Q. What makes you say after two o'clock?  
A. Well, it was about that time.

1242 Q. What makes you think that?

A. Because that was about the time that I would be through with the work.

1243 Q. That is the only way you can fix the time, and you are just guessing at that?

A. No, I am not guessing, that is as near as I can remember about the time; I did not go and look at the clock.

1244 Q. Did you go and look at the clock at all about that time?

208 A. I don't remember whe-rer I did or not.

1245 Q. Did you look at the clock when you got back?

A. I don't know.

1246 Q. As I understand you after you had received notice that an accident had happened you telephoned immediately, and then went to the track to see?

A. Yes sir.

1247 Q. And how long intervened between the time you telephoned and the time you went to the track?

A. I don't know, just as soon as I telephoned, I went right out.

1248 Q. Then you stayed over there, about half an hour?

A. All together.

1249 Q. Oh, all together?

A. Yes sir.

1250 Q. But did you go back to the house again?

A. Yes sir.

1251 Q. And then went back to the wreck?

A. Yes sir.

1252 Q. And a half an hour, you think intervened, how long did you stay at your house?

A. Not very long, I just went over to the shed to look for a chain.

1253 Q. And then you came back?

A. Yes sir.

1254 Q. And then you did not see him?

A. Yes sir.

1255 Q. I thought you said you did not?

A. No sir; he was still there.

209 1256 Q. The men that came to help him, did the section men come?

A. I don't know who they were; they were railroad men.

1257 Q. And looked as though they were laborers on the road?

A. Yes sir.

1258 Q. And everybody was doing all they could too, to get him out?

A. As soon as they had something to do with.

1259 Q. You stayed there long enough to see that it was impossible to release him from his position?

A. Yes sir.

1260 Q. Until the- had implements to do it with?

A. Yes sir.

1261 Q. The people had gone after appliances?

A. Yes sir.

1262 Q. And when they returned they got him out, but you were not there, were you?

A. I was not there.

1263 Q. You say they also tried to get him out without tools?

A. Yes sir.

1264 Q. And you were convinced that could not be done?

A. Yes sir.

1265 Q. Do you live now where you did at the time of the accident?

A. Yes sir.

1266 Q. How far do you place that house from the viaduct?

A. From the line of the viaduct, it is about 20 feet north of that; I don't know how far the house is from the viaduct, but it is north from the viaduct.

1267 Q. North of the viaduct itself 20 feet?

A. Yes sir.

1268 Q. Then it would be somewhat west, too?

210 A. Yes sir.

1269 Q. Can you approximate about how far?

A. I should think about 200 feet west of the track.

1270 Q. You cannot see the track from your house?

A. Yes sir.

1271 Q. Can you see down in the cut?

A. Well, not the track itself, I guess.

1272 Q. That is what I mean; you can see the cut but you cannot see the track?

A. No, I think not.

1273 Q. That is quite a deep cut there?

A. Yes sir.

1274 Q. At the place where the accident occurred the banks on either side are about the same?

A. Yes sir, right where the accident occurred I think they are about the same; yes sir.

1275 Q. Now you think it was about 100 feet from the viaduct where the accident occurred?

A. I think about that, I don't think it was over 100 feet.

1276 Q. Of course you have never measured?

A. No sir, I have not.

1277 Q. You don't wish to be understood as speaking accurate?

A. No sir.

1278 Q. It is a mere estimate on your part?

A. Yes sir.

1279 Q. You think about 100 feet?

A. Yes sir.

1280 Q. And you think that the engine that was going north was a little bit south of the house in that picture?

A. Yes, I do.

211 1281 Q. And how far south would you think?

A. Well, I can't tell exactly how far south.

1282 Q. You don't know how long Mr. Wright remained in that position?

A. I do not.

1283 Q. You was not there when he was finally released?  
A. No sir.

Redirect examination.

Examined by Mr. Berge for the plaintiff:

1284 Q. The men did all they could but they had no tools to work with, was that the situation?

Mr. Holmes: The defendant objects as not proper re-direct examination, the witness having already answered.

Witness excused.

212 Mrs. GERTRUDE MITCHELL, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for plaintiff:

1285 Q. State your name?

A. Gertrude is my first name, Mrs. Mitchell.

1286 Q. Mrs. Mitchell?

A. Yes sir.

1287 Q. Gertrude Mitchell?

A. Yes sir.

1288 Q. Unless you have ever talked before in here it is very hard to hear; these men over here have to hear; speak a little loud?

A. Yes sir.

1289 Q. Where do you live, Mrs. Mitchell?

A. 1810 Holdrege Street.

1290 Q. And where did you live on December 8th, 1909?

A. 1810 Holdrege Street.

1291 Q. The same place?

A. Yes sir.

1292 Q. Now, where is that with respect to the Holdrege Street viaduct?

A. Where I live?

2193 Q. Yes?

A. Well, about 100 feet, I should think from the viaduct, to our house, to the front of the house.

1294 Q. Which way?

A. East.

1295 Q. And how far north of the viaduct would you be?

A. Well, the house would extend back perhaps 125 feet.

213 1296 Q. Well, your house faced south?

A. Faces the south.

1297 Q. Faces Holdrege Street?

A. Yes sir.

1298 Q. And your lot runs northward?

A. Yes sir.

1299 Q. Then your house, or the lot on which your house is situated, faces the same street that the Holdrege street viaduct is on?

A. Yes sir.

1300 Q. How far east of the Rock Island track is your house?

A. From the Rock Island track?

1301 Q. Up to your lot?

A. Well, about 75 feet from the front part of the house and then the back slopes, where the curve comes.

1302 Q. The curve comes closer to it?

A. Yes, so the back part of it would be,—well, I think about perhaps 60 or 65 feet.

1303 Q. Is there a lot between that lot and the Rock Island road?

A. Well, yes, there might be a lot in there.

1304 Q. Was there a house in there?

A. No sir.

1305 Q. You may tell the jury whether your house is the first house on the south side of the Rock Island track and north of the viaduct?

A. Yes, it is the first house.

1306 Q. The buildings, barn, or whatever it is on exhibit No. "8", are those on your lot?

A. Yes sir.

214 1307 Q. That is the back end of your lot?

A. That is the back end of our lot, yes sir.

1308 Q. Do you know the depth of your lot there, how far north from the front it runs?

A. From the front?

1309 Q. How deep are your lots?

A. Well, I don't know, but I think 50 feet is what they are.

1310 Q. 50 feet wide this way, but longer backwards?

A. Longer back, yes.

1311 Q. I will put that another way. You may state whether that barn and these buildings in exhibit "8" are on your lot?

A. Yes, they are on the lot.

1312 Q. Now where were you on the afternoon of December 8th, 1909?

A. At home.

1313 Q. Where were you when this collision took place there?

A. In the house.

1314 Q. How did you learn of the collision?

A. Well, first I heard the collision by the noise and it shook our house.

1315 Q. Did it shake your house?

A. Yes; and then some little boy that was out there, rushed along and called and says, "There is a wreck out there".

1316 Q. You may tell the jury whether you went over there to the wreck?

A. Yes, I went from my back yard, about even with the wreck close to the outbuildings there, but the smoke and the steam kept me from seeing anything outside. I could tell just about where it was.

215 1317 Q. Did you say on the east embankment?

A. No sir, I had a sick baby in the house so I had to go back; no, I was only there, maybe five minutes?

1318 Q. Did you go back again?

A. No sir.

1319 Q. And did you see Mr. Wright?

A. Well, when they carried him out, when they carried him under the viaduct, from my front yard, I seen him then.

1320 Q. After they took him out?

A. Yes sir.

1321 Q. But when you went over there?

A. No, I could not see him because the smoke and steam was coming our direction. The wind was blowing.

1322 Q. Mrs. Mitchell, after you heard the collision inside of the house, how long was it before you got over there and saw it?

A. Well, I think I stepped right out, if I remember; I think I just left and went right out.

1323 Q. Well, within a minute or so?

A. Yes sir.

1324 Q. And which way did you go to get there?

A. I went out the back part of my house and right straight down from the yard, right direct towards the wreck.

1325 Q. That is going westward?

A. Yes sir.

1326 Q. And when you saw the wreck and looked at it, where did you stand with respect to your barn on exhibit "8", I have shown you?

A. That would be northwest of my barn, that I was, right close there by those outbuildings.

216 1327 Q. Which side of those outbuildings, south or north?

A. That would be south of the buildings.

1328 Q. Yes?

A. Yes sir.

1329 Q. Now there seems to be a barn there and outbuildings here closer to the track?

A. Yes, because the barn extends over east and it is not as close as the outbuildings here.

1330 Q. Now where you were standing towards the viaduct from the barn and buildings?

A. Yes, towards the viaduct, just on the south side of them.

1331 Q. How far south of them?

A. Well, close by there, I don't know just exactly how to state how far, because there was a fence that runs in there between our yard and the track.

1332 Q. And the right-of-way?

A. Yes sir, and I was there right by the fence, to keep the wind off of me,—but I remember as I looked from this outbuilding it was right direct down.

1333 Q. After having you located immediately south of the outbuildings there, which way did you look to see the wreck?

A. Well, I looked just right straight west.

1334 Q. Straight west?

A. Yes sir.

1335 Q. And in looking straight west, Mrs. Mitchell, will you tell the jury where the engines were?

A. Well, they were south of those buildings.

1336 Q. Well, south of where you were standing?

1337 Q. Now, there was two engines against each other?

A. Yes sir.

217 1338 Q. And where was the major portion of the two engines, south of you, or level with you, or north of you, or where, explain from the best of your recollections?

A. As far as I can recollect they were south of the buildings so that I just looked right straight west.

1339 Q. In looking straight did you see Mr. Wright's engine, the one going north, or the engine going southward, which one of them was straight west of you?

Mr. Holmes: The defendant objects as leading.

Question withdrawn.

1340 Q. You may state just exactly how the engines stood with respect to the place where you were standing and looking straight west?

A. Well, the engine coming from the south was right as I looked down from the west side, and the other engine you could see the situation was, it was partly south of the buildings, too.

1341 Q. The other end?

A. Yes sir.

1342 Q. Are those buildings in the same place now that they were on December 8, 1909?

A. Yes sir.

1343 Q. Your eye sight is good?

A. Yes sir.

1344 Q. Hearing is good?

A. Yes sir.

1345 Q. How old a woman are you?

A. 38.

1346 Q. You say there was smoke?

218 A. Well, the smoke from the engines and steam were in our direction, that is, the wind was carrying it that direction.

1347 Q. What is your husband's business?

A. Shipping clerk at Benway's furniture company.

1348 Q. Mrs. Mitchell, can you tell the jury how long it was from the time you heard that collision in your house until afterwards when you saw them carrying Mr. Wright away?

A. Well, as far as I could judge, I should think it would be between 40 and 50 minutes, I did not look at the clock or anything, but it seemed as though it would be just about that length of time.

1349 Q. What is your best recollection as to the time of the afternoon when you heard the sound of the collision?

A. Well, I really don't recollect that at all.

1350 Q. Well, was it in the afternoon?

A. Well, it seems as though it was in the afternoon, but I won't say that because I don't recollect, no sir; I had a sick baby in my house and I was kind of taken up with it and I don't remember that.

1351 Q. You say the ambulance stopped in front of your house?

A. It did, but it went down the other side of the viaduct, I think on the south side of the viaduct, because they took him under the viaduct.

1352 Q. You saw them carry him?

A. Yes, I saw them just as they took him under the viaduct.

Cross-examination.

219 Examined by Mr. Holmes for the defendant:

1353 Q. Mrs. Mitchell, showing you exhibit "8", I will ask you how far it is from your fence,—this property belongs to you?

A. Yes sir.

1354 Q. How far is it from your fence there to the viaduct south?

A. Well, I think it is just about 100 feet.

1355 Q. You are just guessing at that?

A. Well I have no- measured it, no sir.

1356 Q. Then you think that immediately west of your fence, stood the engine going north?

A. Yes sir.

1357 Q. That would be right in a straight line from your fence to the track?

Mr. Berge: The plaintiff objects to the question, as not in his question fixing a definite place.

1358 Q. Didn't you say there was a fence there?

Mr. Berge: Yes. But it runs the other way.

A. There is a fence that goes around the curve, you know.

Question withdrawn.

1359 Q. How far is that telephone post from that barn?

A. Well, that post is just about 25 feet.

1360 Q. 25 feet between that telephone pole and your barn?

A. And our barn; I think so.

1361 Q. Then, where did you stand, Mrs. Mitchell?

A. I stood just a very little west from this first outbuilding here, south of it.

1362 Q. And there was a fence there?

A. Yes; there was a fence just around the curve.

220 1363 Q. And that is on your lot?

A. Yes sir.

1364 Q. And you stood in the corner of that fence?

A. Yes sir.

1365 Q. And then this engine stood about 25 feet north of the telephone pole?

A. Just about.

1366 Q. Just about 25 feet north of the telephone pole, the engine going north?

A. Yes sir.

1367 Q. When you got down there, out in your yard, is the barn opposite of your back door?

A. Yes, the barn is.

1368 Q. So this was north of your back door,—you- lot runs north and south, doesn't it?

A. Yes, north and south.

1369 Q. And the barn is on the rear end of the lot?

A. Of the lot; yes sir; it is on the east end, while the other extends over on the west.

1370 Q. The barn stands on the north and west corner of your lot?

A. North and east corner of the lot, but the outbuildings are over by this farther, over by the track. (Indicating)

1371 Q. The house, where that picture shows, is that on the north and the west,—the west would be where the tracks are, would it not?

A. Yes, the west would be where the tracks are.

1372 Q. So it would be north and west from your back door?

A. Yes sir.

1373 Q. Now, when you went out of your back door, you went right straight north, did you?

221 A. No sir, I cut across from the door and went west, that is northwest, because it would be northwest from my back door.

1374 Q. Yes; you went northwest, did you,—I see, and you went to the rear of your lot?

A. Yes sir.

1375 Q. Then when you got down by the outbuildings there, this picture of the house, you looked right west?

A. Yes sir.

1376 Q. And there saw the engine?

A. Yes sir.

1377 Q. That was a *clod* morning?

A. It was; yes sir.

1378 Q. And on account of the cold the steam was dense?

A. Was escaping and in my direction; the wind was from the west.

1379 Q. Very dense?

A. Yes sir.

1380 Q. So you could see the portion of the engine?

A. I could tell there was an engine there, yes sir.

1381 Q. That is all, you could not see anybody or anything?

A. No sir.

1382 Q. After you returned to your house, which was in a very few moments you say?

A. Yes.

1383 Q. Did you observe the time of day it was?

A. I did not; no sir.

1384 Q. And you would not want to say now so far as your memory goes, whether it was morning or afternoon?

A. No sir; I have forgotten that altogether.

222 1385 Q. Now, Mrs. Mitchell, how do you happen to say that it was 40 or 50 minutes from the time you first went out and looked at the engine that you saw Mr. Wright being taken away?

A. Well, I just judged about that time, because I remember at the time, that we were speaking of how long he stayed there, and I remember then at the time that I talked about the time that we thought he was there,—I won't say the exact time.

1386 Q. You merely wish to estimate what it seemed to you?

A. Yes sir.

1387 Q. Yes; you don't speak accurately upon that?

A. No sir; I don't.

1388 Q. Your house is how far south and east of the Rock Island tracks?

A. Well, it is about perhaps 125 feet east, upon the front part of it, and south out house extends, well, even with the walk you know that goes to the viaduct; it is just a very short space there to the walk, so I don't know just how far it would be north.

1389 Q. The number of your house is 1810?

A. 1810.

1390 Q. Holdrege street?

A. Yes sir.

Witness excused.

223 XENIA DOWLEY, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for the plaintiff:

1391 Q. Mrs. Dowley, your full name please?

A. Xenia Dowley.

1392 Q. Where do you live?

A. 838 University Avenue.

1393 Q. In the city of Lincoln?

A. In the city of Lincoln.

1394 Q. Where did you live before?

A. We lived at 1220 Knox street, before we moved down there.

1395 Q. Did you ever live where Mrs. Wistrom is living now?

A. Yes sir.

1396 Q. When did you move away from there?

A. On the 28th of October, a year ago.

1397 Q. That would be October, 1909?

A. Yes sir.

1398 Q. Pretty near the 1st of November, 1909, a year ago last November, that is correct?

A. Yes sir.

1399 Q. You lived in the same place Wistrom's now live?

A. Yes sir.

1400 Q. How long did you live there?

A. Almost three years.

1401 Q. Now, Mrs. Dowley, have you observed the running of this switch engine along that track frequently during the time that you lived there, about one and two or half past two o'clock in the afternoon?

224 Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, too remote from the time of the accident.

Sustained.

The plaintiff excepts.

1402 Q. —.

Mr. Berge: The plaintiff offers to show by the witness that prior to October 28th, 1909, the witness lived where Mrs. Wistrom testified she now lives, west of the Rock Island track and north of the Holdrege street viaduct for about 3 years, and that during that time nearly every day in the afternoon about two o'clock this switch engine would run from the north southward at the rate of about 25 miles an hour to get out of the way of the passenger that was due about that time coming northward.

Mr. Holmes: The defendant objects as not sufficient foundation laid for the introduction of such testimony and for the further reason that the offer is broader and calls for different facts than the question as propounded to the witness.

Sustained.

The plaintiff excepts.

1403 Q. Now Mrs. Dowley, during the time that you lived there prior to October 28th, 1909, or about three years prior to that time where Wistrom's now live, do you remember of other collisions taking place in that cut and about how many?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial and not within the issues of this controversy, the question being propounded to prejudice the case of the defendant.

225 Mr. Berge: Let the record show this, I offer this testimony—

Court: I will excuse the jury while this argument is going on.

Mr. Berge: The plaintiff offers this evidence for the purpose and for the only purpose of bearing upon the question of that particular place, not being a reasonably safe place as the defendant Company owed the deceased Wright as one of its employees, and for the purpose of showing that many other collisions occurred at the same place and that the Company knew or must have known that the place was a dangerous place and not a safe place, such as reasonable care on its part would make it.

Sustained.

Exceptions.

Mr. Berge: I want to show that before December 8th, 1909,

there were three other head-on collisions in the same cut and about the same place as bearing on the question of a dangerous place.

Mr. De Lacey: The defendant objects as incompetent, irrelevant and immaterial, and not tending to support any of the issues in this controversy and as involving in this case an investigation and determination of the negligence of the Company or the negligence of the operators of the other engines at the time these different wrecks occurred, if any did.

Sustained.

The plaintiff excepts.

Witness excused.

226 WILLIAM CHAS. CAVANAUGH, being recalled on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for the Plaintiff:

1404 Q. Mr. Cavanaugh, you were on the witness stand yesterday, or day before?

A. Yes sir.

1405 Q. You are the Chief Train Dispatcher at Fairbury?

A. Yes sir.

1406 Q. Now, since yesterday have you consulted time tables and rules of the company with respect to switch engines and have you found any rules?

A. I consulted one rule and what I could find.

1407 Q. Now, have you in your hand rules of the Company?

A. Yes sir.

1408 Q. That were in force on December 8, 1909?

A. Yes sir.

1409 Q. Rules of what and for what?

A. Rules and regulations for the government of employees of the operating department.

1410 Q. Purports to be issued by the Rock Island Railroad?

A. Chicago, Rock Island & Pacific Railway Company.

1411 Q. There don't seem to be any date on the title page,—to take effect August 1st, 1904?

A. This is a re-print of May 1st, 1907.

1412 Q. Now, I wish you would turn in that book of rules to any rule, if there is one in there respecting the control or government of switch engines, on what page?

A. We had the same yesterday, do you wish that repeated?

227 1413 Q. You had that page 14 of this book under the heading "Yard", and then another one: "Yard engines", you had that yesterday?

A. Yes sir.

1414 Q. Were they read into the records?

Mr. De Lacey: Yes, you read them.

A. It was put in testimony.

1415 Q. Now, in addition to these are there any others?

A. 97-A on page 34.

1416 Q. I wish you would read 97-A into the records?

A. Rule 97-A on page 34 of the book of rules: "Yard limits will be indicated by yard limit boards. Within those limits may occupy main tracks, protecting themselves against over-due trains. Extra trains must protect themselves within the yard limits."

1417 Q. Now, have you got another one?

A. That is all.

1418 Q. Is there anything else in that book, or anywheres else respecting the running or control of switch engines in yards?

A. I would not care to answer that question as stated, on account of "anything else".

1419 Q. Well, if you know?

A. The Superintendent issues instructions that I don't know anything about.

1420 Q. Have you any printed rules that you do know something about switch engines in addition to those you have read?

A. The time table rule "16", is all that I can recall which we had yesterday.

1421 Q. You would not say that the time table Rule 16, has  
228 any application to switch engines?

A. Yes sir.

1422 Q. You say it does?

A. Yes sir.

1423 Q. But in addition to the rules that you have testified about, including the time table, are there any other printed rules that you know anything about, covering switch engines?

A. Why, you spoke of their movement. You understand that we do not move the switch engines, the Chief Dispatcher.

1424 Q. How is that?

A. The Chief Dispatcher does not move the switch engines in the yards.

1425 Q. I am not talking about the Chief Dispatcher now, I am talking about the rules of the Company with respect to the movement of switch engines and no relation to the Chief Dispatcher to it at all?

A. All right.

1426 Q. Have you any rules governing the movement, control or government of switch engines outside of those you have given?

A. The rules of the time table.

1427 Q. You have already given those; including those have you any others?

A. There may be others; I have not picked out those rules that would cover that point.

1428 Q. You say rule "16" applies to switch engines?

A. Yes, to a certain extent.

1429 Q. When it says, "all except first class trains," that is what includes the switch engines?

A. No; "first class trains".

229 1430 Q. It says "all except first class trains"?

A. That is "extra trains".

1431 Q. That includes the switch engines?

A. No sir.

1432 Q. "Will approach, enter, and pass through the following named yards, under full control expecting to find main track occupied or obstructed".

A. Yes sir.

1433 Q. What I want to know, is there a word in those rules that applies to switch engines?

A. Is there a word in there?

1434 Q. Yes, in those rules?

A. Yes sir.

1435 Q. Is the word "switch engines" used in those rules anywhere?

A. Yard engines.

1436 Q. Where is: "yard engines", used?

A. I don't know as it states the word "switch engines".

1437 Q. Does it state the word "yard engines".

A. I don't think that it does.

1438 Q. I have looked for it and cannot find it; I thought I would have your word for it?

A. It refers to the fact of the movement in the yards, and the movement of the switch engines in the yards.

1439 Q. We understand each other then except the rules you have read into the record from your rule book, and except the time table so far as you know, there is no other rule respecting the movements, control, or government of switch engines or yard engines?

A. So far as my memory recalls it.

230 1440 Q. I also understand you that extras do not belong to either, first, second or third class trains?

A. They do not.

1441 Q. And the train dispatcher has nothing to do with switch engines in yards?

A. Only as to giving them time on over due trains.

1442 Q. To give them time on over due trains, but you give them no time on extra trains, that is correct?

A. That is correct.

1443 Q. Of course a switch engine in the yard, a switch engine is not a first-class train, is it?

A. No sir.

1444 Q. A switch engine in a yard, you must have a rule that they must run under control?

A. I cannot recall any. I gave you all the rules there are there.

1445 Q. Then a switch engine could run 30 miles an hour in a yard if there was no law or ordinance against it so far as the rules go?

A. Rules governing certain points, I think, I could not testify to that, because I don't know.

1446 Q. Now, let me confine it to the yard limits regardless of ordinances or statutes?

A. Yes sir.

1447 Q. Would a switch engine run 40 miles a hour so far as any rules are concerned?

A. I don't know, because I do not handle switch engines.

1448 Q. You are a railroad man?

A. Yes sir.

1449 Q. Train Dispatcher?

231 A. Yes sir.

1450 Q. Know something about the rules of the Rock Island Railroad?

A. Yes sir.

1451 Q. And the management of trains?

A. Yes sir.

1452 Q. Do you know of any rules that would prevent a switch engine running 30 or 40 miles an hour in yard limits, eliminating Statutes and ordinances, the rules of the Company?

A. On the main track between the yard limits.

1453 Q. I am talking about, in the yard limits and nothing else?

A. I don't know of any rule.

1454 Q. It would be all right for them to go?

A. I won't say it would be all right, the recklessness.

1455 Q. You don't know of any rule of the Company against it?

A. I do not, and I cannot recall it right now.

1456 Q. Mr. Cavanaugh, I believe you said yesterday, 15 miles might be under control?

A. I don't believe I stated that.

Mr. Holmes: He did not either.

1457 Q. But you did say that running under control meant being able to stop as far as your vision would go and see?

A. Yes sir.

Mr. Holmes: The track clear.

1458 Q. The track clear, of course that would be while you were running?

A. It would be under control certainly if you stand still.

1459 Q. And if a person could see ahead 200 feet and could stop his train or engine, if he saw a train there, by running 50 feet, he would surely be running under control, wouldn't he?

232 A. As far as he could see.

1460 Q. Well, if he could see 200 feet and if he could stop his engine or train in a distance of 200 feet he would be under control?

A. I would consider he was.

1461 Q. And train men running, all are familiar with that rule, or are supposed to be, that is a common rule among railroad men, that that is what that phrase means, "under control"?

A. "Under control", is to stop within the vision,—that is the only explanation I can give of it.

1462 Q. That is commonly understood by railroad men and operators of trains?

A. It is supposed to be understood that way.

1463 Q. Is it printed anywhere?

A. "Under control", yes sir.

1464 Q. Is the definition, "Under control", printed anywhere?

A. It is printed in that rule "16".

1465 Q. Yes, in rule "16", it is printed, you must run under control, but is it written down anywhere, what "under control" means?

A. Is it written anywhere, that under control means as far as you can see you must be able to stop in that distance?

1466 Q. I mean is the rule defined any where?

A. I can't say that it is.

1467 Q. But it is so commonly understood by railroad men?

A. They are so instructed, I believe when they are examined.

1468 Q. That is your opinion, that that is generally done?

A. Yes sir.

233 1469 Q. Under that kind of a rule, Mr. Cavanaugh, if there is a cut or curve, could you explain how a man not knowing that there is a train coming from the other way, how he can ever avoid an accident and collision?

A. I can explain it.

1470 Q. The object would have to be a standing stationary object in order to avert a collision, if he adhered to the rule, wouldn't it?

A. I don't understand that question, the object.

1471 Q. If a man can see 200 feet we will say, and I suppose he is running so he can stop just exactly within 200 feet, would you say he was running under control then under your rule?

A. Well, now, I would like to say this.

1472 Q. No; you answer my question?

A. All right.

1473 Q. I mean this; if you could see 200 feet, if he could stop within that distance he is running under control?

A. That is my understanding of it. I am not authority on that.

1474 Q. Now, then, if he would stop at a point this side of 200 feet or right at 200 feet, he would still be under control and you would say he was under control when he first tried to stop?

A. That is my understanding.

1475 Q. Then a man never could avert a collision under that rule unless the object he saw was a stationary one and stood still?

Mr. Holmes: The defendant objects as calling for a conclusion and argumentative.

Sustained.

The plaintiff excepts.

234 Cross-examination.

Examined by Mr. Holmes for the defendant:

1476 Q. Mr. Cavanaugh, you said something about when the employees are examined. All employees, as I understand it, are examined before a Board, before they are employed?

A. Yes sir.

1477 Q. And they are asked about their knowledge of all such questions as for instance, "running under control"?

A. Yes sir.

1478 Q. Now, then, are all of the employees furnished with this book of rules?

A. They are.

1479 Q. From the Section foreman up to the Operating Department?

A. Yes sir.

1480 Q. Did Mr. Wright as an engineer, have these books or one of them?

A. Yes sir.

1481 Q. And had he been examined prior to his employment?

A. He certainly had or they would not have let him went out.

1482 Q. Is there any difference, Mr. Cavanaugh, between a switch engine and what is called a "yard engine"?

A. There is no difference.

1483 Q. "A yard engine" is the engine that stays in the yards, and handles the cars?

A. Yes sir, except the trains.

1484 Q. Excepting what?

A. Excepting making up the trains in the yard.

235 1485 Q. Breaking them?

A. Yes sir.

1486 Q. Ghen, this engine with which #1486 collided on the 8th day of December was a "yard engine" in the Lincoln yards?

A. Yes sir.

1487 Q. And as I understand you to say the yard engine or switch engine is the "king bee" in the yards,—a "yard" or "switch" engine, is the "king bee", in its yard, excepting as the rule applies to all first-class trains?

Mr. Berge: The plaintiff objects to the question as not cross examination, as calling for an opinion and conclusion of the witness, and inference not unwarranted from the rules, not a statement of any fact, and the rules themselves are the best evidence.

Overruled.

The plaintiff excepts.

A. It is.

1488 Q. You, as Train Dispatcher, are not concerned in any way, nor none of your duties apply to the "yard" or "switch" engine except to notify the switch engine of over due trains?

A. Give them time on over due trains.

1489 Q. And that is for the purpose of getting them out of the way for first class trains?

A. Yes, and assisting them in their work.

1490 Q. And the *spped* that the switch engine or yard engine in the yard does not concern the dispatcher at all?

A. No sir.

1491 Q. Eliminating, I mean the ordinary and the general law of the statutes. Yesterday, you had with you a train sheet from which you testified. Have you got that sheet with you this morning?

236 A. Yes sir.

1492 Q. Will you produce it?

A. (Witness produced paper.)

1493 Q. Referring to your train sheet of December 8, 1909, and showing you the movement of all trains that day I will ask you to read from your train sheet inot the record the movements of Extra #1486, up to the time of the ac-ident complained of in this case?

Mr. Berge: The plaintiff makes no objections, that is, I assume that is the one, the same one you had yesterday and it is a permanent record, a truthful record of the movement of that train, Extra #1486.

A. Yes sir, Extra #1486, flagman Hinitt, engineer, Wright. Called at Fairbury for 11-40 A. M.

1494 Q. Called?

A. Called for that time,—given an hour and a half's time, and called for 11-40 A. M.; left Fairbury, Nebraska, at 11-40 A. M. with a light engine; arrived at Jansen 11-50 A. M.

1495 Q. How many miles from Fairbury to Jansen?

A. 6.6 miles. Departed at Jansen, 11-55 A. M. with a light engine, arrived at Plymouth 12-25 P. M.

1496 Q. How far is that?

A. 9.9 miles.

1497 Q. At what rate of speed was that?

A. That, I cannot say without figuring the distance and the time.

1498 Q. How long a time did it take to go from Jansen to Plymouth?

A. It took 30 minutes from Jansen to Plymouth according 237 to the report.

1499 Q. Go on?

A. And left Plymouth at 12-35 P. M., passed Platonia, 12-40 P. M., 13.4 miles; passed Marcel at 1-07 P. M., that is 13.3 miles; arrived at Lincoln at 1-20 P. M., 13.9 miles.

1500 Q. And how many miles from Fairbury to Lincoln?

A. 57.1 miles.

1501 Q. What was the total running time between Fairbury and Lincoln?

A. 1 hour and 40 minutes, and 5 minutes at Jansen for the stop and 10 minutes at Plymouth.

1502 Q. So that the real running time was an hour and 20 minutes?

A. It would be an hour and 25 minutes.

1503 Q. A hour and 25 minutes?

A. Yes sir.

1504 Q. Now, then, is there any other entries?

A. The time that they left Lincoln at 2-05 P. M.

1505 Q. And does it show when the accident occurred?

A. It shows that he rode to C. N. here; it shows it is Lincoln telegraph office, Rock Island depot at 2-23 P. M., that two trains had met east of Lincoln, and man killed.

1506 Q. How does that rate of speed with that ending from Fairbury to Lincoln compare with the running of a first-class train?

Mr. Berge: The plaintiff objects as not cross examination, immaterial.

Sustained.

The defendant excepts.

1507 Q. What is the maximum speed according to first class trains?

Mr. Berge: The plaintiff objects as not cross examination, immaterial.

Sustained.

The defendant excepts.

238 1508 Q. Was there anything unusual, Mr. Cavanaugh, in the running of this train, about which you are talking, about extra #1846?

Mr. Berge: The plaintiff objects as not cross examination, incompetent and immaterial, and calling for an opinion and conclusion of the witness and not bearing on any issue in the case.

Sustained.

The defendant excepts.

1509 Q. Do you know, Mr. Cavanaugh, as Train Dispatcher whether there was anything known as "slow orders" between Fairbury and Lincoln on that day?

Mr. Berge: The plaintiff objects as not cross examination, incompetent, immaterial, calling for nothing about the dispatch of this engine, and bearing on no issue in the case.

Sustained.

The defendant excepts.

1510 Q. Did Extra #1486 pass any trains on its way to Lincoln?

A. Yes sir.

1511 Q. Where?

A. They passed No. 86 at Jansen.

1512 Q. And what kind of a train was No. 86?

A. A local freight train.

1513 Q. Mr. Berge has asked you Mr. Cavanaugh, if there were any other orders other than what he has offered in evidence here, and I want to ask you if there isn't orders known as "Bulletins that are published for the purpose of being examined by the train crews?

A. Yes sir.

1514 Q. What are those bulletins called?

239 A. We call them "Pink bulletins".

1515 Q. Have you any record here showing the "pink Bulletins" that were issued that day?

A. Yes sir.

1516 Q. Will you procure that, please?

A. Yes, is it necessary to make this one of the exhibits?

1517 Q. We will give it back to you, sure. Do you hold in your hand a "Pink bulletin" containing orders that was issued upon the 8th day of December, 1909?

Mr. Berge: The plaintiff objects unless it has some relation to Extra #1486.

Overruled.

The plaintiff excepts.

A. Containing bulletin No. 727, that was issued on December 6th and still in effect when Mr. Wright left.

1518 Q. No- did that Bulletin in any manner affect the running of Extra #1486?

1519 Q. Would you read into the record that part of the orders that applied to #1486?

A. Mr. Berge: The plaintiff objects as not proper cross examination, no foundation laid.

Overruled.

The plaintiff excepts.

1520 Q. I will ask you, Mr. Cavanaugh, if Mr. Wright signed for that Bulletin?

A. Yes sir.

1521 Q. Have you got that?

A. Yes sir.

1522 Q. Will you place that into the record, read the entry there where he signed for it?

240 A. Extra, east, Wright, on December 8th, "pink bulletin" No. 727.

1523 Q. His signature attached to it?

A. Extra east, Wright, December 8.

1524 Q. Is his signature attached to that?

A. Yes sir.

1525 Q. You are familiar with that signature?

A. Yes sir.

1526 Q. And that is his signature?

A. I consider it is.

1527 Q. Now, will you read from the "pink bulletin" such orders as applied to Extra #1486?

Mr. Berge: The plaintiff objects as no proper foundation laid, I don't know what year that was.

A. 1909; that is a receipt for this "pink bulletin".

1528 Q. What year?

A. 1909.

1529 Q. You may read into the records, Mr. Cavanaugh, such orders in the "pink bulletin" in your hand pertaining to the running of Extra #1846?

Mr. Berge: The plaintiff objects to the question for the reason that it is incompetent, not proper cross examination, no proper or sufficient foundation laid, the deed itself shows there is no year attached to it, and the "pink bulletin" is on another page, and there is no evidence when that "pink bulletin" was put there.

A. This is receipt, and the men do not put the years down that is all.

241 1530 Q. What is that receipt for?

A. For "pink Bulletin" No. 727, which is kept by the operator.

1531 Q. When is it posted there?

A. At the time it is signed for, at the time it is figured, the operator puts it here and it is signed here by the conductor, handled all the way through, there is no conductor puts down the year all the way through, but the "pink bulletin" they sign for shows the year, received at 4-05 A. M. by operator Stevens.

Previous question read.

1532 Q. Read all the "pink bulletin"; there is probably some on that that don't apply; some of it that don't apply?

A. Form C. T. 106—Name of railroad—telegraph bulletin—Must not be used for train orders—Telegraph bulletin.

1533 Q. Read it as it is there?

A. 4-05 A. W. S. Fairbury, December 6th.

(By Mr. Berge:)

1534 Q. 12-6?

A. 12-6-1909, No. 727, To operator of Omaha line. "Pinks, 721-724-726 are annulled. Reduce 20 miles an hour on fills at M. P., 511-6, and 511-15, Acct. embankment sliding from M. P. 516-25 to M. P. 517-2. From 523-10 to 524-20; from M. P. 526-12 to 526-15. 10 miles an hour M. P. 528 to Platt River bridge 20 miles an hour over fill; M. P. 541-13 to 541-25, and on fill east of Alvo ten miles an hour on fill M. P., 549, 25 miles an hour from mile east to east switch Havelock, 30 miles an hour; from Havelock to 27th street Lincoln ten miles an hour, over 27th str. curve, 15 miles an hour on new fill west from bridge near mile post 565-7. Bad swing in track just in front west hand-car house De Witt. 15 miles an hour  
242 from De Witt to Jansen except to ten miles an hour at M. P. 604-15 in cut west of double crossing on Cub Creek Hill, 15 miles an hour; M. P. 150-26 east main line pocket at Lincoln coal chute bad order. (Signature.) C. L. Brown.

1535 Q. Who was "C. L. Brown", Mr. Cavanaugh?

A. Superintendent of the Nebraska Division.

1536 Q. Now I would like to ask you if those orders were any or all of them applied to running of Extra #1486?

A. Yes sir.

1537 Q. Will you please state what "M. P." there so much refers to?

A. "Mile Post".

1538 Q. What do the figures refer to?

A. The number of the mile post.

1539 Q. For instance "M. P. 511"?

A. Would be mile post 511.

1540 Q. And the "6" What?

A. Six poles from 511, six telegraph poles.

1541 Q. And for instance where it says 15 miles an hour on new

fill west from bridge near mile post 565-7 would mean mile post 565, and 7 telegraph poles?

A. Yes sir.

1542 Q. To locate the spot?

A. Yes sir.

1543 Q. Now referring again to your train sheet, Mr. Cavanaugh, I will ask you if from your train sheet to which you have referred you can tell whether or not the orders pertaining to the running of extra #1486 from Fairbury to Lincoln were being observed by engineer Wright on that day, the 8th. of December, 1909?

Mr. Berge: The plaintiff objects as not cross examination,  
243 wholly incompetent, irrelevant and immaterial and bearing on no issue in this case and an opinion and conclusion of the witness.

Sustained.

The defendant excepts.

Mr. Holmes: The defendant offers to show by the witness that the decedent Otto Wright in his run with #1486 from Fairbury to Lincoln was disobeying the orders issued upon that day and in force and was violating such orders in the speed of his train as appears upon the train sheet which the witness holds in his hand and to which his attention had been called.

Mr. Berge: The plaintiff objects as not cross examination, wholly incompetent, irrelevant and immaterial, and bearing on no issue in this case and an opinion and conclusion of the witness.

Sustained.

The defendant excepts.

#### Redirect examination.

Examined by Mr. Berge for the plaintiff:

1544 Q. Now, a word about these "pink" orders, they are issued every day?

A. No sir, there are some that are issued daily and some that are not. They remain in effect until they are annulled.

1545 Q. If they are grading somewhere and got a bad track that goes in one of those "pink" orders?

A. If we are notified of it, yes sir.

244 1546 Q. And gives them the speed they shall cross?

A. Yes sir.

1547 Q. If there should be something about the Platt River bridge that was unusual they would get that into a "pink order"?

A. Yes sir.

1548 Q. And of course trainmen get them only as they are issued and are in force until they are annulled?

A. They get them each time as they start on a trip.

1549 Q. Now, with respect to engine #1486, the record you read from the time it left Fairbury until the collision, who makes that record?

A. The record comes from the operator, what we call report of

trains passing stations by telegraph and the trick dispatcher, he puts it on the train sheet at the time it is given to him off of the instrument.

1550 Q. Does he get that information as the train passes through the station?

A. Yes, as a rule, there may be times when it may be a few minutes afterwards.

1551 Q. Who made the record that some woman 'phoned in about this collision near the Holdrege street bridge, who made that record of that?

A. Dispatcher W. H. McCoy.

1552 Q. At Fairbury?

A. Yes sir.

1553 Q. Of course he got his information from Mr. Evans here or whoever was at his duty?

A. Yes, I could not swear it was Mr. Evans because it does not say who it was.

245 1554 Q. Got any other "pink" orders except those you have read?

A. Yes sir.

1555 Q. I mean excepting engine #1486?

A. Yes, I think there is one more.

1556 Q. Let me see it. You call them "pink" orders because the paper is pink color?

A. We call the "pink bulletins."

1557 Q. The paper is that color?

A. The rules of the Company, it is commonly known as the "pink bulletin," telegraph bulletin is the proper name for them. Here is one that he got. (Indicating.)

1558 Q. That is No. 728?

A. Yes sir.

1559 Q. When did he receipt for that?

A. The same date.

1560 Q. I wish you would read that in the record?

A. The "pink bulletin"? Yes.

1561 Q. No; the "pink bulletin" itself?

A. Telegraph bulletin,—go over the whole thing again?

1562 Q. Yes?

A. Telegraph bulletin, must not be used for train orders. Telegraph bulletin, Fairbury, December 6th, 1909. 728 to all trains east. Examine switches closely when opening and closing switches to see that switch points fit up close and that snow does not cause points to gap open. C. L. Brown. A. J. W., 10-28 P. M. (Written across the face of it in lead pencil T. F. D., to another page.)

1563 Q. What does that mean?

A. Transferred to another page.

246 1564 Q. What page?

A. It does not state there just what page. (Witness turns to another page.)

1565 Q. Is that it?

A. Yes sir.

1566 Q. That is the same one, is it?—

A. This is in handwriting, but the other in typewriting?

A. Yes; this was made by operator Bell, the other by operator Wright.

1567 Q. The other one don't seem to be receipted to by Mr. Wright?

A. He don't receipt for it only once; he receipted for it here.

1568 Q. But there is more men that received it, therefore you have to have two pages?

A. Yes sir.

1569 Q. Have you any book with you that shows the movement of all of the trains out of Fairbury east and west?

A. Not west, I think not. Yes I have; I think the trains east and west.

1570 Q. I say have you east?

A. Yes, the trains east in a book.

1571 Q. How long have you been Chief train dispatcher down there?

A. Oh, since May 7th, 1909.

1572 Q. Now, how long had you known Mr. Wright?

A. Why, just since he had come there.

1573 Q. How long was that?

A. I could not say the exact date.

1574 Q. Did he have a regular train out of there?

A. He did not, as I understand it he was the Extra list; 247 he may have had a regular train, referred to the regular train as No. 86 or No. 94 or some train like that. That would be something for the road foreman or equipman to answer as to the train he had in particular.

1575 Q. About how long had you known him?

A. I could not state how long it was.

1576 Q. Well, two days or two weeks or two months?

A. I knew him from the time he first came there.

1577 Q. Was that two days or two months?

A. Probably two months, I could not state exactly, what day he came there without looking at the record. The way I know Mr. Wright is from conversation had with him when he would come up; the time he has been there, I don't know, had no record in the office.

1578 Q. Your record in the office where he run?

A. Yes, the points between where he run, and as they come up and get the orders they very frequently come up to my office and I go out and see them, and I probably know every man.

1579 Q. Do you know where his regular run was?

A. No sir; he did not have any regular run, as I understand. His train sheet shows on all divisions. Possibly he did not get up to Nelson, I could not say as to that.

1580 Q. When you say "all divisions" what do you mean?

A. The sub-divisions.

1581 Q. Where does that all go to?

A. From Council Bluffs to Phillipsburg, from Horton to Nelson. There is four sub-divisions.

1582 Q. You don't think he had been there over six weeks, do you?

A. He was there sometime in October, November and December.

1583 Q. The latter part of October and November?

248 A. Possibly two or three months, I could not state the exact time, the train sheet shows he was on the road running October, November and December.

1584 Q. Well, in all of October?

A. Not all of October, I think it was October 28th.

1585 Q. And he was subject to orders to run wherever he was directed?

A. Yes sir.

1586 Q. Of course a good many engineers have regular trains?

A. Some engineers have regular trains, and they are on the extra force?

1587 Q. Was Mr. Wright a young man?

A. He was a man about my age, maybe a little older?

1588 Q. A good stout healthy looking man?

A. Yes sir.

#### Recross-examination.

Examined by Mr. Holmes for the defendant:

1589 Q. Will you turn to your train sheet to which Mr. Berge has directed your attention and show the runs Mr. Wright made?

It now being 12 M. an adjournment was taken until 2 o'clock P. M. same day, March 16, 1911.

249 2 o'clock p. m., March 16th, 1911.

Court met pursuant to adjournment and the following proceedings were had and done.

Question withdrawn.

1590 Q. I will ask you, Mr. Cavanaugh, if you have any records in your possession that shows the runs that Mr. Wright made after his employment on this Division?

A. Yes sir.

1591 Q. You may refer to those records?

A. (Witness refers to papers.)

1592 Q. I will ask you now, if you know when was Mr. Wright first employed by the Rock Island, the defendant in this case, do you have any record of that?

A. Yes sir.

1593 Q. You may state what that date was?

A. September 20th, 1909.

1594 Q. September 20th?

A. Yes sir.

(By Mr. Berge:)

1595 Q. You mean at Fairbury or——

A. How is that?

1596 Q. Do you mean at Fairbury?

A. That is, when he was employed at Fairbury, started his student trips at Fairbury on September 20th.

1597 Q. What is a student trip?

A. I beg your pardon, it was September 13th, he started his student trip, and ended it September 20th.

1598 Q. What is a student trip?

A. That is where they go over the Division with another engineer learning the road.

250 1599 Q. And had you that record of his student trips?

A. Yes sir.

1600 Q. How many trips did he make as a student?

A. You mean between those points?

1601 Q. I will confine it between Fairbury and Omaha?

A. Made one round trip as a student.

1602 Q. One round trip?

A. Yes sir.

1603 Q. That would be two trips through the Lincoln yards?

A. Two trips through the Lincoln yards.

1604 Q. When were those trips made?

A. On September 15, 1909, on train No. 90 and on September 18th on train No. 97, Council Bluffs to Fairbury.

1605 Q. And in going from Council Bluffs to Fairbury, they passed through the Lincoln yards one way or the other?

A. Yes sir.

1606 Q. What is that document you hold?

A. This is the student's papers that he signed, and the engineers that he rode with it.

1607 Q. And is that his signature attached to that?

A. Yes sir.

1608 Q. You are familiar with that signature?

A. Yes sir.

1609 Q. And is that all that that student's paper contains?

A. Considerable printing matter on it.

1610 Q. Will you read that?

Mr. Berge: Oh, let us offer it in evidence. (Mr. Berge takes paper.)

1611 Q. I ask you what that student paper contains and ask you to read it into the record?

251 A. Rock Island System.

Mr. Berge: The question is first, what it contains, does it contain anything except this trip?

A. It shows the date and the number of the train and the points from and to and the engineer that he was with and it is acknowledgement showing that he understands the location.

Mr. Berge: There is no objection.

1612 Q. Read it all?

A. "Rock Island System, to all engineers, conductors, on Nebraska Division, C., R. I. & P. Railway Company. This will be your au-

thority for allowing Mr. O. O. Wright to ride on your train over Nebraska Division for the purpose of learning the road. You will make a record in space provided below giving the date, number of train and through what points on the line he rode on your train. (Signature) W. D. Oakford, R. F. of E. Superintendent or Trainmaster is also on there, dated 9-13. No. of train, Extra #1448 from Fairbury to Phillipsburg. (Signature) J. E. Robinson, engineer, 9-14, 1st 94, Phillipsburg to Fairbury. Signature of J. E. Otey, engineer. 9-15.

1613 Q. When you say "9-15," that is under the column of "date?"

A. Yes sir. No. of train 90, from Fairbury to Council Bluffs. Signature of J. P. Mergen, engineer.

1614 Q. When you said "Council Bluffs" it is written only "C. B.", isn't it?

A. Yes, and also FBY. 9-18-97, Council Bluffs to Fairbury, Wm. Costello, to C. R. I. & P. Ry., Superintendent or Trainmaster. September 20th, 1909. Dear sir:—I have gone over your division between the places and with the conductors indicated above for the purpose of learning the road. I have given particular attention to all the tracks of the main line, and all the side tracks, switches and spurs. I have located and familiarized myself with all stations and stantion grounds and I have noticed the location of all cotton platforms or other platforms, feed houses, stock yards, mill cranes or other appurtenances or structures on, near, through, over, or under the track. I have located and familiarized myself with all the overhead bridges, coal chutes, coal mine tipples, and structures connected therewith, and all water tanks, and spouts, and all trolley, telegraph and telephone wires. I have been furnished with, and have carefully studied the book of rules governing the employees of this Company. I have been warned by engineer Mergen of the duties I am about to undertake and the dangers to which I will be exposed and the risk connected therewith, all which I hereby assume, and with the knowledge of all the conditions connected with that work. I accept the conditions as they now exist, and am ready to enter the service of your Department as engineer and am ready to go out on my runs when called at Fairbury. (Signature) O. O. Wright, Applicant."

1615 Q. Now, Mr. Cavanaugh, have you any other records in your possession showing other or different runs than are mentioned in this sutent's paper?

A. Yes sir.

1616 Q. Will you produce them?

A. (Witness produced paper) Train sheet showing the runs from the Division.

253 1617 Q. You may read confining it between Fairbury and Council Bluffs?

A. Yes sir: "Chicago, Rock Island & Pacific Railway—

1618 Q. I just want the date of the trip and where it was?

A. "Fairbury, Thursday, October 17, 1909.

1619 Q. Pulling what train?

- A. Train No. 90.  
1620 Q. From where to where?  
A. Fairbury to Council Bluffs.  
1621 Q. Is that all on that sheet?  
A. That is all on this sheet?  
1622 Q. Take the next sheet, what is the next date?  
A. Friday, October 8th, 1909, train extra 1717, from Council Bluffs to Fairbury.  
1623 Q. Any more on that sheet?  
A. No sir.  
1624 Q. Take the next one?  
A. Saturday, October 9, 1909, No. 94 from Fairbury to Council Bluffs.  
1625 Q. Now, in each one of those you have mentioned, Mr. Wright was the engineer?  
A. Mr. Wright was the engineer.  
1626 Q. Now, the next sheet, the next date?  
A. Monday, October 11th, 1909, No. 97, Council Bluffs to Fairbury. Make that the 1st section of No. 97.  
1627 Q. The first section?  
A. Yes sir.  
1628 Q. What was 97, a freight train or passenger?  
A. Freight train.  
1629 Q. The next day?  
254 A. Thursday, October 28th, 1909. Second No. 94.  
1630 Q. That means the second division or section?  
A. Second section from Fairbury to Council Bluffs. That would be on October 28th, it shows on the train sheet of October 28th.  
1631 Q. Now the next date?  
A. Saturday, October 30th, 1909, extra 1727, west, Council Bluffs to Fairbury.  
1632 Q. Mr. Wright engineer?  
A. Mr. Wright engineer.  
1633 Q. Now, the next date of his trip, what class of train was that, do you know?  
A. Second class train,—Oh, the extra?  
1634 Q. Yes?  
A. That did not have any class.  
1635 Q. What was it a freight or passenger?  
A. Freight train. Saturday, November 13, 1909, No. 90, engineer Wright, Fairbury to Council Bluffs.  
1636 Q. And what train was that?  
A. Train No. 90.  
1637 Q. What was that a freight or passenger train?  
A. Freight train.  
1638 Q. Now, what was the next date?  
A. Wednesday, November 17, 1909, No. 85, from Council Bluffs to Lincoln.  
1639 Q. What was that a freight or passenger train?  
A. Freight train.  
1640 Q. The next date?

255 A. Thursday, November 18, 1909, No. 86, engineer Wright Fairbury to Council Bluffs.

1641 Q. What train was that?

A. Freight train.

1642 Q. Yes. The next day?

A. Saturday, November 19, 1909, No. 86 Fairbury to Council Bluffs, engineer Wright.

1643 Q. What character of train?

A. Freight train.

1644 Q. The next date?

A. Friday, November 19, 1909, No. 85, Engineer Wright, Council Bluffs to Fairbury.

1645 Q. And what character of train?

A. Freight train.

1646 Q. Have you any other dates?

A. The day of the accident we have already put in, do you wish that in?

1647 Q. That, is December 8th?

A. On Wednesday, December 8th, Fairbury to out of Lincoln.

1648 Q. Now, Mr. Cavanaugh, in all of the trips that you have mentioned from Fairbury to Council Bluffs, and from Council Bluffs to Fairbury, you may state whether or not engineer Wright passed through the Lincoln yards?

A. He would.

1649 Q. And over the point where this accident occurred?

A. He would.

1650 Q. And through the cut and under the viaduct mentioned in this case?

A. He would.

1651 Q. Mr. Cavanaugh, these train sheets are a true and correct record of the movement of the various trains you  
256 have mentioned?

A. They are.

1652 Q. And of the officers in charge?

A. Yes, they are.

1653 Q. Engineers, and etc.?

A. Yes sir.

1654 Q. Were any of those trains mentioned upon these train sheets to which you have referred, first class trains?

A. No sir.

1655 Q. All of the freight trains and extras?

A. Yes sir.

1656 Q. And if extras, were freight trains?

A. Yes sir.

1657 Q. With the exception of the last trip, when it was the lone engine?

A. The light engine.

1658 Q. Mr. Cavanaugh, do you know whether every person in the employ of the Rock Island, more especially in the Operation Department, such as engineers, firemen, barkemen, and, etc., execute one of those student papers?

A. Yes sir.

1659 Q. And before employment are permitted to study the road?

A. Yes, making students' trips.

1660 Q. And required to study the road?

A. Required to do it.

1661 Q. And the purpose of that is to familiarize themselves with all conditions, including cuts and curves, and etc.?

Mr. Berge: The plaintiff objects, the sheet itself shows  
257 what it is for, not cross examination and immaterial—

Redirect examination.

Examined by Mr. Berge for plaintiff:

1662 Q. This is what is called the Rock Island System student sheet that you have read into the record, and shows on the 9th month and the 18th day the number of train 97, Council Bluffs to Fairbury, just the one trip?

A. That is one trip over one way on the Division.

1663 Q. And when you say, "students' sheet"—

A. Students' sheet.

1664 Q. That don't mean, that they are beginners or students as engineers?

A. No; it may be an old engineer learning the road, that has not been on this System before.

1665 Q. And the learning the road from Council Bluffs to Fairbury by one trip going over?

A. Not necessarily.

1666 Q. That is what he did on this?

A. Two trips on that sheet, one east and one west between Fairbury and Council Bluffs.

1667 Q. Well, then, the round trip, we will say?

A. Yes sir.

1668 Q. Have you got any cotton platforms between Fairbury and—

A. We have not.

1669 Q. What?

A. We have not.

258 1670 Q. Coal mine tipples?

A. No.

1671 Q. No, no coal mines, on this Division. Then he did not examine them, did he?

A. That is to cover the System on some forms on the Divisions they cover those things.

1672 Q. You have a blank form here to cover everything they are likely to have on the whole system?

A. I could not say whether they have got everything on there or not.

1673 Q. When Mr. Wright signed this, of course as a matter of fact, he had not examined coal mine tipples, neither had he examined cotton platforms, had he?

A. Because we did not have any to examine.

1674 Q. And in going over the road, of course it is a run over the road, they don't stop?

A. It all depends on what train they run.

1675 Q. Have you got the record of the student's trip?

A. Yes, but I haven't got the record here for those trains.

1676 Q. Tell me how long it took for Mr. Wright to go with this man from Fairbury to Council Bluffs?

A. I haven't got those train sheets; I have them in my office so I could tell you.

1677 Q. But you haven't got them here?

A. No sir.

1678 Q. Got an independent recollection of it?

A. No sir.

1679 Q. Don't know how long it took to go from Council Bluffs to Fairbury?

259 A. No sir, not here?

1680 Q. Where are they?

A. In Fairbury.

1681 Q. Why didn't you bring them?

A. I brought along all I could possibly think of.

1682 Q. You brought along all except this one?

A. Yes sir.

1683 Q. Every trip Mr. Wright made between Council Bluffs and Fairbury, except this student's trip?

A. Yes, I can get those here by 9:20 this evening if you want them, or they will leave Fairbury at 9:20 I should say.

1684 Q. All right, I would like to have them, but I believe you told Judge Holmes every one of the trips between Fairbury and Council Bluffs were extra trains?

A. No sir, freight trains.

1685 Q. Well, weren't they extra?

A. Not all of them, the records show 97, 90, 94, 85 and 86 and extras.

1686 Q. You have given all the trips he has made between Council Bluffs and Fairbury or Fairbury and Council Bluffs during his employment by the Rock Island Road upon that division?

A. No sir, there is some of those that you wish the train sheets for and I think there is one or two others, probably.

1687 Q. The one I wish, the train sheet for you have testified about?

A. Yes sir.

1688 Q. You have accounted for a number of others here and I understood you to say that is the total number of trips he made?

A. There are three other trips, three other train sheets that I should have that I have not. The reason I have not got them, I took the west end train sheets for that date instead of the

260 east end.

1689 Q. For that date?

A. Yes sir, three different dates, which I will bring down on the same bunch.

1690 Q. Then there are three trips besides those you have named?

A. I think it is three.

1691 Q. And when the three are included that is the total you have?

A. Yes sir.

Recross-examination.

Examined by Mr. Holmes for the defendant:

1692 Q. Can you tell whether those student trips are daylight trips or night trips?

A. By the train sheet.

1693 Q. Take those train sheets and show what time they went through Lincoln?

A. Yes, train sheets, but said student trips?

1694 Q. Can you give the time?

A. Yes, I can give the time they left Fairbury and arrived at Council Bluffs.

1695 Q. Can you tell without looking at those sheets whether they passed through Lincoln in the day time?

A. No, some night and some day trips.

1696 Q. This student paper, where does this student paper come from?

A. This?

1697 Q. Mr. Wright hand that to the Company?

A. Wright signs it and gives it to the Company after he makes the student trips.

261 1698 Q. What is the rule about how many students' trips, he should take; I will ask you if it is a fact that when he hands in his paper and says he is familiar with the road that is sufficient?

A. Yes sir.

1699 Q. He can stay on and make student's trips, as many as he pleases?

A. Yes sir.

1700 Q. Until he familiarizes himself with the road?

A. Yes sir.

1701 Q. Do you know when 85 and 86 go through Lincoln?

A. What time?

1702 Q. Yes?

A. At this date?—It shows the time they were due.

1703 Q. Take you- sheet and show what time they went through Lincoln?

A. No. 85 on November 19 arrived at Lincoln at 1-46 P. M. and departed at 3-40 P. M.

1704 Q. What is that, in the afternoon?

A. Yes sir.

1705 Q. Take each sheet there?

A. No. 2nd—94 October 28, arrived at Lincoln at 4-35 A. M. and departed at 5-10 A. M.

1706 Q. All right?

A. 4-35 A. M. and departed at 5-10 A. M., October 29,—that is on the sheet of October 26th.

1707 Q. All right, what is the next one?

A. On 3rd—No. 94, October 9, that should be October 10, on the train sheet of October 9, arrived at Lincoln at 6-50 A. M., it does not show the departing time.

262 1708 Q. When?

A. It does not show the departing time out of Lincoln.

1709 Q. Got here at 6 o'clock in the morning?

A. 6-50 A. M.

1710 Q. Next one?

A. Passed Prairie Home 7-39 A. M.

1711 Q. Now the next?

A. December 8, that is the day of the accident, do you wish that?

1712 Q. Well, we have got that?

A. November 13th, on No. 90 arrived at Lincoln at 5 o'clock A. M. departed at 7-14 A. M.

1713 Q. Now the next?

A. I beg your pardon, that is P. M., 5 o'clock P. M., 7-14 P. M.

1714 Q. All right?

A. No. 86 November 18, arrived at Lincoln at 3-15 P. M.

1715 Q. Is that afternoon or morning?

A. Afternoon, P. M.—3-35 P. M. On No. 85, Wednesday, November, 17, arrived at Lincoln at 6-10 P. M.; took his engine for No. 5 on that day.

Mr. Berge: When did he leave?

A. Left here 8-46 P. M. on No. 5. No. 86, November 20, arrived at Lincoln 11-50 A. M., departed at 12-56 P. M. On Extra 1718 west, arrived at Lincoln at 10-50 P. M., October 8th, and departed at 12-40 A. M., October 9th.

(By Mr. Berge:)

1716 Q. Is that going north?

A. West.

(By Mr. Holmes:)

1717 Q. That was at night?

A. Yes sir.

263 1718 Q. All right. The next.

A. On No. 1st—97, October 11, arrived at Lincoln 1-45 P. M., departed at 2-25 P. M.

1719 Q. All right, going which way?

A. West.

1720 Q. Is that night or day time?

A. That is in the daytime in the afternoon, October 7th. On No. 90 arrived at Lincoln at 8-50 P. M. and departed at 11 o'clock P. M.

1721 Q. That is at night?

A. Yes sir.

(By Mr. Berge:)

1722 Q. Going which way?

A. East. On Extra 1727 west, October 30, 1909, arrived at Lincoln at 3-18 P. M. and departed at 4-10 P. M.

Q. Going which way, west?

A. West bound.

1723 Q. What date?

A. October 30th, 1909.

1724 Q. That is all of that, is it?

A. Yes sir.

(By Mr. Berge:)

1725 Q. You will have that same kind of business for this student trip in the morning?

A. Yes sir.

1726 Q. On the other three trips?

A. The balance of the dates, I will have it complete?

1727 Q. The other three trips?

A. Yes sir. I don't want you to think I left those at home on purpose?

(By Mr. Berge:)

1728 Q. No sir, don't you worry about that.

Witness excused.

264 REUBEN M. CARR, being produced and duly sworn on behalf of the plaintiff, testified as follows.

Examined by Mr. Berge for the plaintiff:

1729 Q. Your name is?

A. Reuben M. Carr.

1730 Q. Where do you live, Mr. Carr?

A. 44th and "W" Street.

1731 Q. In this city?

A. University Place.

1732 Q. University Place?

A. Yes sir.

1733 Q. That is in this county?

A. Yes sir.

1734 Q. What's your occupation, Mr. Carr?

A. Yard foreman for the Rock Island.

1735 Q. Yard foreman for the Rock Island?

A. Yes sir.

1736 Q. And you are that at the present time?

A. Yes sir.

1737 Q. You may state whether you were switch yard foreman on December 8th, 1909?

A. I was.

1738 Q. When you was yard foreman, do you mean foreman, simply of the switch engines or what in their yards?

A. Foreman of the switch engine, yes sir.

1739 Q. Did the Rock Island at that time maintain a switch engine here?

A. Yes sir.

265 1740 Q. How many?

A. One.

1741 Q. Besides the yard foreman what other men was connected with the engine?

A. The helpers.

1742 Q. H-w?

A. Two helpers, yard foreman and two helpers.

1743 Q. That is what do you call those helpers?

A. Switchmen.

1744 Q. Yourself and two switchmen?

A. Yes sir.

1745 Q. Besides the engineer and fireman?

A. Yes sir.

1746 Q. That is all together five men on the engine?

A. Yes sir.

1747 Q. Who, as Judge Holmes would say here, who is the "King Bee" of the engine?

A. The foreman.

1748 Q. That is yourself?

A. Yes sir.

1749 Q. The engine is under his direction?

A. Yes sir.

1750 Q. The Judge wants to change it, he says the "Royal Potentate"?

A. Yes sir.

1751 Q. Now, were you in the city of Lincoln on December 8, 1909?

A. Yes sir.

1752 Q. And were you on duty that day?

A. Yes sir.

1753 Q. I don't believe the jurors can hear you, talk up louder.

A. All right.

266 1754 Q. This switch engine that day, that afternoon, you may state whether it had been out near or towards 27th street, or out there?

A. It had been out beyond 27th street, yes sir.

1755 Q. That is beyond the yard limits?

A. No, sir, this side of the yard limits, the yard limits are about 33rd street.

1756 Q. And did you go along on that trip?

A. Yes sir.

1757 Q. Did you go out on the engine?

A. No, I did not go out on the engine; I went out on the street car and met them at 27th street.

1758 Q. The engine had preceeded you?

A. Yes, it was out there.

1759 Q. How long before you went out, did the engine go?

A. Oh, in the neighborhood of an hour and a half.

1760 Q. What time of day did you go out?

A. Well, it was along about one o'clock, or something like that, or 1:10, probably.

1761 Q. When you went out?

A. Yes, I don't remember exactly.

1762 Q. No, your best recollection is all I want. And where did they go, how far out?

A. Went to 27th street, and then went to the Burlington transfer, that is over in the west part of town.

1763 Q. That is the Rock Island, has got to go out to 27th street or thereabouts in order to get on the Burlington transfer?

A. Yes sir.

1764 Q. And they did go out in the Burlington yards?

A. Yes sir.

267 1765 Q. But you did not go out with them?

A. No sir.

1766 Q. You think you went out in the neighborhood of one o'clock?

A. Yes sir.

1767 Q. Did you say you took a street car?

A. Yes sir, University Place car, I think it was.

1768 Q. Where did you get off?

A. I got off at 33rd and I don't know the name of the street where the traction car runs to University Place.

1769 Q. It is beyond 27th street?

A. Yes sir.

1770 Q. You took the University Place or Havelock car where they cross 27th street, they run east?

A. And then turn east.

1771 A. North and then east?

A. Yes, 33rd street, about two blocks beyond the turn where they went to University Place, and walked down to the track, going to University Place, and then back to 27th street.

1772 Q. After you go off of the street car, which way would you walk?

A. South.

1773 Q. Where did you get on the street car?

A. Got on at "O" street at the Rock Island track.

1774 Q. Where?

A. At "O" street and the Rock Island track.

1775 Q. What time about, do you think you got on there?

A. About 1:10, I think, somewhere near that.

1776 Q. When you took that street car, extra 1486 or the Wright engine was in the yards?

A. Just coming in as we started out.

268 1777 Q. You knew about this extra?

A. I see it, yes sir.

1778 Q. You told the other men when you got out to your engine that there was an extra in the yards?

A. An extra in the yards, yes sir.

1779 Q. Well, you may state whether you informed your men on the switch engine of this train?

A. Yes, I did.

1780 Q. And when did you do that?

A. Just when we started to come into the yards, just as they came off of the transfer onto the main line.

1781 Q. About where was that out there?

A. That was just on about 27th street, probably 100 feet east of there.

1782 Q. East of 27th street?

A. Yes sir.

1783 Q. And who was on the engine when you told them that?

A. The engineer's name was Hall, I don't remember the fireman's name.

1784 Q. And the brakeman there, the flagman?

A. Two switchmen, Mr. Kinstry and Francisco.

1785 Q. Did you tell it to all of them?

A. Yes sir.

1786 Q. Then, before you reached 27th street, you may state, coming this way, you may state whether you knew all of you of this extra being in the yards?

A. Yes, we did.

1787 Q. Well, did you know what it was?

A. I did not know where it was going to; I just knew it came in the yards, but did not know it was going anywhere, or not.

269 1788 Q. You knew there was an extra in the yards?

A. An extra from the south.

1789 Q. Yes, coming from the south?

A. Yes sir.

1790 Q. In coming from 27th street, Mr. Carr, this way, up to the time of the collision was you riding on the engine?

A. On the back end of the engine.

1791 Q. That is what I was going to ask you, on what part of the engine?

A. The back end, east end.

1792 Q. The east end or north end?

A. Yes, east end.

1793 Q. Was there a foot-board across there?

A. Yes sir.

1794 Q. Was it a regular switch engine?

A. Yes sir.

1795 Q. And do you know whether you stood to the right or left of the center or where?

A. I stood on the right side coming this way.

1796 Q. On the right side?

A. Yes sir.

1797 Q. Then, you could see the track?

A. No sir, I could not see the track beyond.

1798 Q. Because the track was curving to the left all the time?

A. Yes sir.

1799 Q. Could you see the track in front of the engine at all unless you would reach out?

A. No, I could not see the track in front of me at all.

1800 Q. Did you stand there all the way from 27th street to the time of the collision when you jumped?

A. I got off about 50 feet before they hit.

1801 Q. What I mean is, up to the time you jumped?

A. Yes sir.

1802 Q. Did you keep that place on the right side until you jumped off?

A. Yes sir.

1803 Q. You say the engine ran 50 feet after you got off?

A. Something like that, about that, yes.

1804 Q. It might have been more or less?

A. Well, not very much more.

1805 Q. Where did you jump?

A. Stepped off the back end onto the ties.

1806 Q. All you had to do was to step right off?

A. Yes sir.

1807 Q. Did you, yourself see Wright's engine before the collision?

A. Not in the cut, no sir.

1808 Q. Well, you didn't see it anywheres else except down at the depot?

A. I saw it when it came into the yards, yes sir.

1809 Q. I mean in running southward, now, did you see Mr. Wright's engine from where you stood or from where you got off before the collision?

A. No sir, I did not see it.

1810 Q. When you got off, had you see- the engine yet?

A. No sir.

1811 Q. There were some more men on the foot-board?

A. McKinstry was on the south side, he was looking out at the south; he saw the engine just as it came around the curve.

1812 Q. He was on the back foot-board?

271 A. Yes sir.

1813 Q. McKinstry was?

A. McKinstry.

1814 Q. Who was he?

A. One of the switchmen.

1815 Q. Mr. Francisco was between you?

A. Yes, me and McKinstry, behind the engine.

1816 Q. Was there a foot board on the front end of that engine?

A. Yes sir.

1817 Q. And all three of you men were riding on the back of the foot-board?

A. Yes sir.

1818 Q. Anybody on the front foot-board?

A. No sir.

1819 Q. Well, what made you jump?

A. Well, I did not want to stay on there when the collision was.

- 1820 Q. You did not see it?  
A. He told me about it.
- 1821 Q. Who is he?  
A. Mr. McKinstry.
- 1822 Q. What did he say?  
A. He said, "There comes that extra."
- 1823 Q. There comes that extra?  
A. Yes sir.
- 1824 Q. That is, the extra you had told him about?  
A. Yes sir.
- 1825 Q. You all understood that?  
A. All understood it, yes sir.
- 272 1826 Q. Did he jump before you did?  
A. Yes, he got off just a few steps before I did, I don't know how far.
- 1827 Q. What about the man between you?  
A. He got off after McKinstry did.
- 1828 Q. And then you?  
A. Yes sir.
- 1829 Q. Then you all jumped about the same time?  
A. About the same time, as near as we could, yes sir.
- 1830 Q. Didn't lose any time to get off?  
A. No sir.
- 1831 Q. Which side did the engineer ride on the switch engine?  
A. On the right side.
- 1832 Q. Did he jump before you did?  
A. No, just as I did, just about.
- 1833 Q. Now, there was snow on the ground, wasn't there?  
A. Yes sir.
- 1834 Q. And you lit on the ground in just a moment or two before the collision took place?  
A. Yes sir.
- 1835 Q. What was the engineer's name?  
A. Hall.
- 1836 Q. And you lit on the ground you say, probably facing south?  
A. Facing south.
- 1837 Q. Where did you find Hall around there?  
A. He was lying outside; he went out of the cab window.
- 1838 Q. Laying on the ground?  
A. Yes sir.
- 1839 Q. Where was he lying with respect to where you stood?  
273 A. About 10 or 12 feet ahead of me, went just about 10 or 12 feet after I got off.
- 1840 Q. That is where you stopped?  
A. Yes sir.
- 1841 Q. He was ten or twelve feet ahead of you this way?  
A. Yes sir.
- 1842 Q. Right opposite the track?  
A. Yes sir.

1843 Q. Yes, to the west side of the track?

A. Well, yes, the west side, yes.

1844 Q. Then, he must have jumped before you did or about about the same time?

A. I suppose he went out of the window just about the same time I got off.

1845 Q. Did you jump the first moment you could after the man standing on the left of the foot-board yelled "There she is," "There is that extra"?

A. No, it probably was not over three or four seconds.

1846 Q. Well, the moment you heard you jumped off?

A. Yes, as soon as I could.

1847 Q. Before that had you had any warning or notice of that engine?

A. No sir. Could not hear any whistle nor nothing.

1848 Q. Well, from the movements of your engine, had you had any warning before that?

A. No sir, just about the time he hollered, I felt the air going in our engine.

1849 Q. He jumped about the same time?

A. He probably threw on the air and jumped at the same time.

1850 Q. You jumped the moment he lit, and the other 274 man jumped out of the window at the same time?

A. Yes, a few seconds after he yelled, I jumped; I felt the air go on and I got off.

1851 Q. But you think Mr. Hall, the engineer on that engine was 10 or 12 feet south of you?

A. Something like that, in the neighborhood of that, yes sir.

1852 Q. About how far from the track?

A. He was about four feet, three or four feet.

1853 Q. You still think that Hall did not jump before you did?

A. I don't think he did, no sir, no, I know he did not because he lit out there about the time I struck, he went out of the window.

1854 Q. About the time you stepped off he went out of the engine?

A. Yes sir.

1855 Q. A simultaneous act on the part of both of you as near as you can tell?

A. Yes sir.

1856 Q. That is correct, is it?

A. Yes sir.

1857 Q. Did you see the fireman jump out?

A. No I did not see him.

1858 Q. But you did *saw* the engineer and the two switchmen, did you?

A. I — see the engineer, but I could not see the switchmen, they was on that side and the- jumped off back of me. They dropped off on one side and then the other and then I was facing the engineer to see him go out of the cab window.

1859 Q. Now, Hall was lying down when you saw him?

A. Yes sir.

1860 Q. He went into the snow?

A. Yes sir.

275 1861 Q. What was the number of your switch engine?

A. 1220.

1862 Q. You say you never saw Wright's engine until after the collision?

A. No sir.

1863 Q. Was there any flagman there in the cut that day?

Mr. Holmes: The defendant objects as incompetent, immaterial, and irrelevant, and not within the issues of this controversy, no charge in the petition of any negligence on the part of the defendant by reason of there being no flagman.

Overruled.

The defendant excepts.

A. No, there was no flagman there.

1864 Q. Now, you say that you were running your engine within the yard limits from 27th street clear this way?

A. Yes sir.

1865 Q. And you were the foreman of this switch engine or yard engine?

A. Yes sir.

Mr. Holmes: The defendant objects the witness has already stated.

Sustained.

The plaintiff excepts.

1866 Q. Now, then, have you any rule about how you run in the yard limits?

A. Run under control, yes sir.

1867 Q. Is there such a rule?

A. Yes sir.

1868 Q. A printed rule?

A. I don't know as it is a printed rule but it is a rule that our Superintendent gives us to work by, a yard rule.

1869 Q. With respect to switch engines?

276 A. Yes sir.

1870 Q. That is your switch engine here in the yard limits was to run under control, you say that is the rule?

A. Yes sir.

1871 Q. What do you understand, "under control" means?

A. To stop in the distance you can see.

1872 Q. Stop the distance you can see?

A. Yes sir.

1873 Q. How do you know that is the rule of the Superintendent?

A. Because I have seen it.

1874 Q. How?

A. Because that is our rule they give us to work by.

1875 Q. Have you got those rules with you?

A. No sir.

1876 Q. Can you give such a rule?

A. No. I don't know as I can, but that has always been the yard rules.

1877 Q. What?

A. To work under control inside of the yard limits.

1878 Q. Now, have you seen such a rule of the Rock Island road with respect to yard engines or switch engines?

A. No, I don't know as I have.

1879 Q. Well, where did you get it?

A. It is a general rule, it has always been lived up to, that is, it has always been a yard rule.

1880 Q. A yard rule?

A. That is the way I understand it.

1881 Q. The crew of your engineer understand it?

A. Yes sir.

1882 Q. It is an accepted rule in the Rock Island yards  
277 here in Lincoln?

A. Yes sir.

1883 Q. How?

A. Yes sir.

1884 A. Now, Mr. Carr, don't you have any rule requiring some of your switchmen to ride on the front foot-board?

A. No sir.

1885 Q. How?

A. You do if you are pushing a string of cars, there is a man rides on top, but where the engineer can see out plainly in front there is no rule for a man riding on the front.

1886 Q. But the engineer going southward could not see ahead of him?

A. Yes, the engine was ahead right south, and he could look right out of his front window the same as any engineer could see going over the road, look out of the front window that way.

1887 Q. The farther a man is ahead the farther he can see?

A. Yes sir.

1888 Q. How long is your switch engine?

A. Oh, about 40 feet, I suppose.

1889 Q. Well, about forty feet?

A. Something like that.

1890 Q. Now, don't you think a man standing on the front foot-board instead of the rear foot-board that he could see more than forty feet farther ahead than the engineer could?

A. Oh, yes, I suppose he could.

1891 Q. Then, a man standing on the front foot-board, on this day, what is your judgment how much farther down the track could he have seen than the engineer?

278 A. Well, he could have seen probably 40 or 50 feet farther than the engineer, but he could not have seen any farther than the fireman, to speak of.

1892 Q. Well, the fireman,—he is the fireman, isn't he?

A. Yes.

1893 Q. You said a while ago you have a rule to ride on the front foot-board when?

A. We have no rule to ride on the front foot-board, no.

1894 Q. Haven't you got a rule requiring you to ride on the front end of every moving train of cars that you shuffle in the yards?

A. We have on a string of cars, not switching, no sir.

1895 Q. What is that rule about a string of cars?

A. If you are taking a string of cars any distance.

1896 Q. And the engine behind?

A. The engine behind,—you are supposed to station a man on the front end to watch out, but ordinarily in switching you don't have to do that.

1897 Q. What is that man on the front end for?

A. On the front end of a string of cars to look out for crossings, a long string of cars where you are taking them some distance.

1898 Q. You have a rule of that kind?

A. Yes sir.

1899 Q. That rule would apply if you have one car ahead of the engine?

A. Yes sir.

1900 Q. Does that rule say it does not apply when you have the engine alone?

A. No, it does not say anything about that.

279 1901 Q. What was the weather condition that day?

A. It was clear, I think.

1902 Q. The wind blowing from which way?

A. I think from the northwest, if I am not mistaken, I don't remember.

1903 Q. Pretty cold?

A. Pretty chilly, yes sir.

1904 Q. And frosty?

A. Not so frosty, I don't think, it was clear.

(By Mr. Holmes:)

1905 Q. Speak out, Mr. Carr, I don't hear you.

A. It was clear and pretty cold.

1906 Q. Mr. Carr, commencing at the north side of the viaduct as it goes over your road there and northwards for two or three or four hundred feet have you ever experimented there to see how far you could see on the track? Answer "yes" or "no" I want to know whether you have or not?

A. Yes sir.

1907 Q. Did you ever take measurements?

A. No sir.

1908 Q. You say you have not?

A. No sir.

1909 Q. You say you did not see the fireman jump out?

A. I did not see the fireman jump out, no sir.

1910 Q. Did you see him immediately afterward?

A. I don't remember seeing him for some few minutes, no sir.

1911 Q. What is your recollection when you first saw him, if you did not see him lying on the other side in the snow?

A. The fireman?

1912 Q. Yes?

280 A. No, I did not see the fireman at all.

1913 Q. When did you first see him after the collision?

A. He was on the west side of the engine walking down with the rest of us.

1914 Q. You saw him on the west side of the engine?

A. Yes sir.

1915 Q. Mr. Carr, after the col-ission did you notice the exact place of the col-ission?

A. It was about——

1916 Q. No, no, answer whether you did or not.

A. Yes sir.

1917 Q. Did you charge your memory especially with where it was?

A. Just about.

1918 Q. How far north of the viaduct was it?

A. About 200 feet.

1919 Q. Did you measure it?

A. No.

1920 Q. That is your estimate?

A. Yes.

1921 Q. You never talked with me personally about this case, did you?

A. No sir.

1922 Q. Did you talk to Judge Holmes?

A. No sir.

1923 Q. Mr. De Lacey?

A. No sir, I don't know the gentleman.

1924 Q. Now, you may tell the jury whether your engine was injured any by the col-ission?

A. It was.

1925 Q. To what extent and where and how?

281 A. Well, the front end was caved in a little and the front trucks was knocked from in under it.

1926 Q. What?

A. The front trucks was knocked from in under it.

1927 Q. Did it derail your engine?

A. Just the pony-trucks, was all I believe.

1928 Q. The pony-trucks are the little trucks in front of the engine are the—

A. Yes sir.

1929 Q. They were derailed?

A. Yes sir.

1930 Q. Was Mr. Wright's engine derailed?

A. No sir.

1931 Q. Stayed on the track?

A. Yes sir.

1932 Q. Was Mr. Wright's engine injured?

A. Why, the front end was caved in some, just, I don't know to what extent; the pilot was knocked off and some other damage.

1933 Q. The whole engine including the pony-trucks were on the track, Mr. Wright's engine?

A. Yes, the whole engine.

1934 Q. Did you see Mr. Wright there that day?

A. Yes sir.

1935 Q. And when and how soon after you jumped off?

A. Well, just as soon as the steam cleared away; it was not over five minutes, it was not that long.

1936 Q. Did you help get him out?

A. No, I went down to the depot as soon as the wreck occurred.

282 1937 Q. What did you go down there for?

A. To send up some men to help and to notify the authorities at Fairbury, the officials at Fairbury.

1938 Q. Did you stop there and help get him out, before you did all that?

A. I did until I saw we had nothing there to work with, particularly and then I went after help.

1939 Q. Did you have jacks and tools for accidents like that on your engine?

A. Why, we did not have on our engine, no.

1940 Q. Did you try to do anything before you went down to the depot?

A. Yes sir.

1941 Q. What?

A. We tried to pry the tank apart with a bar.

1942 Q. Did you take hold of Wright and try to pull him out?

A. No, did not try to pull him out because we thought that would be injurious to him.

1943 Q. Did you examine and see just how he was pinioned there?

A. It looked as though he just started to go out of the gangway and was caught between the engine and tank.

1944 Q. Where?

A. Right in the back, and caught right through the back.

1945 Q. What about one of his legs?

A. One of his legs seemed to be drawn up just as though it was in the act of stepping, as it came together.

1946 Q. Did he stand up straight?

A. Well, very nearly.

1947 Q. How long did you remain there until you went down to the depot?

283 A. I probably was there in the neighborhood of ten minutes.

1948 Q. Then you went down afoot, did you?

A. Yes, that is the only way I had to go.

1949 Q. How far was it from there to the Rock Island depot?

A. Well, it is very nearly three-quarters of a mile.

1950 Q. Isn't it farther than that?

A. Well, it might possibly be, yes sir.

1951 Q. And you walked down or ran down there?

A. I ran.

1952 Q. And you don't know exactly when they did get him out?

A. No, I don't.

1953 Q. Did you see Mr. Wright after that?

A. No, as I got back up there they had him out and were taking him out and putting him in an automobile.

1954 Q. An automobile or ambulance?

A. Ambulance or automobile, I think, I would not be sure.

1955 Q. You got back just as they were taking him into that ambulance or automobile?

A. Yes sir.

1956 Q. Walked back?

A. No, I came back on the engine.

1957 Q. What engine?

A. There was a train came in from the south.

1958 Q. Passenger engine?

A. No, freight engine and I took that to go up there and see what we could do.

1959 Q. How long do you think it was from the time of the collision until you got back there?

A. It must have been forty minutes anyway.

284 1960 Q. And Mr. Wright must have been in there most of that time?

A. I don't know how long before that it was until they got him out, probably not very long.

1961 Q. Did you talk with Mr. Wright?

A. No, I did not speak to him at all.

1962 Q. Did you hear him say anything?

A. No, I did not.

1963 Q. You said a while ago, or I asked you,—rather, whether you ever experimented to see how far you could see and you said you did?

A. Yes sir.

1964 Q. You have gone up and down that track a good many times?

A. Yes sir.

1965 Q. I hand you exhibit "8", Mr. Carr, and I will ask you to examine it, that is looking northward?

A. Yes sir.

1966 Q. And where the picture begins is about the north side of the viaduct?

A. Just about.

1967 Q. Well, it is?

A. Yes, there is an electric light wire.

1968 Q. I don't believe that the jury can hear you?

A. Yes, just about the north side of the viaduct, this picture is.

1969 Q. You have observed the embankment around there on both sides a good many times?

A. Yes sir.

1970 Q. Tell the jury whether the embankments in that picture are about as they were December 8th, 1909?

A. Yes, just about the same.

285 1971 Q. And the buildings would lie just about the same?

A. Just about, yes sir.

1972 Q. And the appearance on the other side looking northward, about the same?

A. Yes sir.

1973 Q. And the curve there looks natural, does it?

A. Yes sir.

1974 Q. Now, you say you never made any actual measurements, and what you know about it, how far you could see, would be your estimate?

A. Yes sir.

1975 Q. Since the injury, since this collision, did you make a special trial at it, or simply from your common observation?

A. Common observation, as we would go around the curve.

1976 Q. How far do you think you could see?

A. I think we can see from the bridge 300 feet up to here, just about 300 feet.

1977 Q. About 300 feet?

A. Yes sir.

1978 Q. That is what you mean, is if you emerged from the viaduct going northward you could see 300 feet yonder?

A. Just about from the viaduct.

1979 Q. On which side of the engine or which rail we will say?

A. Well, from the east rail.

1980 Q. And Mr. Carr, it follows then, does it, if you were 300 feet northward, looking southward, you could see the same distance could you?

A. Just about, let us see, no, no, you cannot see so far, coming from the east.

1981 Q. Why not?

286 A. Because you come around this curve here and this point obstructs the track; you can't see quite so far coming west as you can going east.

1982 Q. Suppose you stood on the east rail right under the viaduct?

A. Yes sir.

1983 Q. And you would send me up on the track to stand on the east rail as far as you could see me, how far do you say I would go northward?

A. In the neighborhood of 300 feet.

1984 Q. Until I apssed out of sight?

A. Yes sir.

1985 Q. That is, suppose you could see me, couldn't I turn around and see you too?

A. Yes, from that point.

1986 Q. That is what I mean; what makes you say 300 feet?

A. Well, I think that is just about the distance you can see.

1987 Q. That is your estimate, your guess?

A. My guess, yes sir.

1988 Q. The embankment there is higher than the engine on the east side?

A. About the same height.

1989 Q. If you stand here you could not see the engine across the embankment?

A. No sir.

1990 Q. If you were over in there looking out that way (Indicating) you could not see the engine across the embankment?

A. No, you could not on account of that building.

1991 Q. The building would help obstruct it?

A. Yes sir.

1992 Q. Where was the accident with respect to that building?

287 A. It was just about the curve, just about here? (Indicating.)

1993 Q. Which way from the building, straight west?

A. West.

1994 Q. Well, west?

A. West, yes sir.

1995 Q. Now you are not mistaken about that?

A. No I don't think so.

1996 Q. This exhibit No. "6" is the exhibit looking southward?

A. Yes sir.

1997 Q. That shows the embankment in the proper way there? To the left of you going southward?

A. Yes sir.

1998 Q. The embankment, December 8th, 1909, was about as it appears on this picture?

A. Just about the same.

1999 Q. Refreshing your memory now, from this exhibit do you think that barn or these buildings interfered with the vision across there?

A. Yes, it would, getting around this way here, from there.

2000 Q. You think it would?

A. Yes sir.

2001 Q. I now hand you exhibit No. "5", that is from the north looking southward,—station yourself north of the viaduct and look south?

A. Yes sir.

2002 Q. Is that about the condition it was December 8th, 1909?

A. Yes sir, just about the same.

2003 Q. That curve all around there, does it show about the same curve all around until you strike a straight line again?

A. Yes, just about, I think.

288 2004 Q. Now, here is an exhibit, exhibit No. 7,—station yourself a couple of hundred feet north of the viaduct and still look north, and see, is that about the condition of the embankment over to the right?

A. Yes sir.

2005 Q. That is about 200 feet, looking northward still?

A. Yes sir.

2006 Q. Was it about that way December 8th, 1909?

A. Yes sir.

2007 Q. Now, I hand you exhibit "4", goes south of the viaduct about 500 feet, and looking northward?

A. Yes sir.

2008 Q. Is that about the lay of the land there?

A. Yes sir.

2009 Q. Was it that way about December 8th, 1909?

A. Yes sir.

2010 Q. When you got on the switch engine and told these men of this extra in the yards it was an extra?

A. Yes sir.

2011 Q. You understood it so?

A. Yes sir.

2012 Q. What time of the day was the collision, about?

A. Well, I don't remember, it was along about 2, a little after 2 o'clock, sometime, but I don't remember what time.

2013 Q. The passenger train is due north at that time?

A. Yes, it was late.

2014 Q. How do you know?

A. Because I was down at the depot and found out where they were, I don't just remember just how much late, but then they were some late.

289 2015 Q. Well, weren't you going in to get out of the way of the passenger that day?

A. Yes sir.

2016 Q. That is just what you were doing?

A. Yes sir.

2017 Q. The passenger was what you call a first-class train?

A. Yes sir.

2018 Q. How far towards Lincoln did you have to go to clear, to get out of the way for the passenger?

A. We had to go about, oh, about a half a mile.

2019 Q. About a half a mile further down from the place where the collision occurred?

A. Just about, yes sir.

2020 Q. And what was the regular time that that passenger train was to go through there?

A. 2-10, I think it was.

2021 Q. 2-10. Now, sir, when this collision took place weren't you required to make a report as to the time it took place?

A. Yes sir.

2022 Q. Where is that report?

A. Why, it is a blank that we have there, a regular form that we have to make.

2023 Q. Well, what did you report as to where the accident took place and the time of day?

A. I don't remember now.

2024 Q. Could you look it up and let me know?

A. I don't know whether I have the copy or not.

Mr. Holmes: Perhaps I have got it.

2025 Q. I would like to have you fix the time there from this report, or some record, you have just exactly the minute when  
290 this collision took place; will you do it, Mr. Carr?

A. If I can, if I can find my report, yes sir.

2026 Q. If the passenger was late, would you have a record of that or would you simply be informed at the depot?

A. Be informed at the depot.

2027 Q. By a written order?

A. Sometimes have a written order, most usually, yes sir.

2028 Q. Did you have that day?

A. I don't remember whether we did or not.

2029 Q. Do you remember now how late that train -as reported to you?

A. No, I don't—I don't know just exactly how late it was.

2030 Q. But at any rate, why was you running into Lincoln at that time?

A. We was coming in there to continue our work inside.

2031 Q. But you were on the main track?

A. Yes sir, we were on the main track, coming into the main yards.

2032 Q. You were getting out of the way of the passenger, too?

A. Yes sir.

2033 Q. Mr. Carr, at the time of this accident on December 8th, 1909, was there any semaphore in that cut anywhere?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, and it seeks to describe other and different conditions than existed at the time of this accident, and for the further reason that there was not any semaphore there; the decedent was aware of the fact, and if there was any risk incident thereto he assumed it, the evidence having already shown that he was familiar with the place where this accident occurred.

291 (Mr. Berge here reads from a law book.)

Mr. Holmes: I take exceptions to Mr. Berge reading an opinion here. Objections made to the statement made by the counsel for the reason that it is prejudicial and it seems to be giving only his opinion and is not giving any authority, and if we are going to discuss this proposition I will ask that the jury may be excused.

Court: The objection overruled, but I will excuse the jury while you are arguing the matter.

It now being 4-55 P. M. March 16th, 1911. Court was adjourned until tomorrow morning at 9-30 A. M., March 17th, 1911.

9-30 a. m., March 17th, 1911.

Court met pursuant to adjournment and the following proceedings were had and done.

292 REUBEN H. CARR, recalled and examination resumed.

Examined by Mr. Berge for plaintiff:

Question withdrawn.

2034 Q. Mr. Carr, how long have you been railroading?

A. I have been with the Rock Island ten years.

2035 Q. Were you ever an engineer?

A. No sir.

2036 Q. You don't know then, in what distance trains can be stopped?

A. No sir.

2037 Q. I wanted to ask you this question. I have forgotten who the man was on the left rear step, who was that?

A. McKinstry.

2038 Q. McKinstry?

A. Yes sir.

2039 Q. What did you say McKinstry said?

A. He said, "There they come."

2040 Q. Well, you did not understand that language, did you?

A. Yes sir.

2041 Q. What did you understand by it?

A. I understood the extra was coming out.

2042 Q. Oh, then, you were looking for it?

A. Yes sir.

2043 Q. "There they come" or, "There she is", I think some other witness said, indicating to you that it was the extra?

A. Yes sir.

2044 Q. Your engine that day immediately before that collision what is your recollection whether any whistle was sounded?

Mr. Holmes: The defendant objects as having been already answered.

293 Court: He said there was none.

2045 Q. Or any bell?

A. I don't remember it.

2046 Q. Did you say whether you jumped before or after the other two men?

A. After.

2047 Q. After?

A. Yes sir.

Cross-examination.

Examined by Mr. Holmes for the defendant:

2048 Q. How long have you been yard foreman, Mr. Carr?

A. About ten years.

2049 Q. For the Rock Island?

A. Yes sir.

2050 Q. And what is the duty of the yard foreman?

A. To look after the trains and spotting the cars and such as that.

2051 Q. And making up of trains, and breaking them again?

A. Yes sir.

2052 Q. Do you use the switch or yard engine in the performance of that duty?

A. Yes sir.

2053 Q. Who is the conductor of the yard engine?

A. I am supposed to be.

2054 Q. You are responsible for its going and for its coming?

A. Yes sir.

294 2055 Q. And for what it does?

A. Yes sir.

2056 Q. All of the switchmen then, and those attending the engine, the engineer and fireman are directly under your control?

A. Yes sir.

2057 Q. What was your engine doing on the morning of December 8, 1909?

A. Why, we had been ordered to the Burlington transfer and were just returning from the transfer into the yard.

2058 Q. Where is the yard limit on the east?

A. On or near 33rd street and University Place.

2059 Q. That is 6 blocks beyond 27th street, is it?

A. No, very nearly a mile, no beyond 27th street a good half mile.

2060 Q. How do you know where the yard limit is?

A. Because there is a board there that designates the east limit of the yard.

2061 Q. And what does that board say?

A. "Yard limit board".

2062 Q. And is that on the other end of the yard, too?

A. Yes sir.

2063 Q. And where is that?

A. That is on about South street.

2066 Q. And on that morning you knew that there was using that day?

A. Well, I don't remember.

2065 Q. And what was its number?

A. 1220.

2066 Q. And on that morning you knew that there was an extra engine in the yards?

A. Yes sir.

2067 Q. You had your workmen with your engine in the yard?

A. Yes sir.

2068 Q. You received no notice of whether it was going to stay or going out or back?

A. No sir, I don't know.

2069 Q. Don't know anything about its movements?

A. No sir.

2070 Q. Why, then, did you come in from 27th street to the city of Lincoln or into the yard knowing that engine was in there?

A. We had business coming in there; we had right to come in there?

2071 Q. You had right to come in there?

A. Yes sir.

2072 Q. Where did you get those rights?

Mr. Berge: The plaintiff objects as calling for an opinion and conclusion of the witness, not cross examination.

Sustained.

The defendant excepts.

2073 Q. Where did you get those rights?

A. Why, the yard rules.

2074 Q. Under your yard rules?

Mr. Berge: The plaintiff objects as not the best evidence, no foundation laid, hearsay, not responsive and moves to strike it out for that reason, that is not the answer the question calls for.

Court: You are entitled to it if it is in writing; it does not appear here,—overruled.

The plaintiff excepts.

296 2075 Q. Are these rules in writing or just the custom or understanding?

A. Just an understanding, they are not in writing.

2076 Q. *But* you mean is, that they are rules of action that you have adopted in the yards?

A. Yes sir.

2077 Q. Now, coming down from 27th street, how did you come?

A. Well, we came right along, probably ten miles an hour.

2078 Q. How many?

A. Probably ten miles an hour.

2079 Q. From 27th?

A. Yes sir.

2080 Q. Did you slacken that speed any?

A. Yes sir.

Mr. Berge: Let him state what he did.

A. When we came to the crossing we slowed down to probably two and a half or three miles, just as we rounded the sharp curve.

2081 Q. Just at the point where the curve commences you slowed down to two and a half or three miles and hour?

A. Yes sir.

2082 Q. What did you say running "under control" meant?

A. Under control" means to stop at the distance you could see the track clear ahead.

2083 Q. And were you going at that rate of speed?

A. Yes sir.

2084 Q. Was your switch engine under control at that time?

A. Yes sir.

2085 Q. Now, I wish you would tell us who you said constituted the crowd that morning?

A. Sir?

2086 Q. Who was it that constituted the crowd that morning on the switch engine, and the switchmen,—talk a little louder?

A. Hall was the engineer and I don't remember the fireman's name, and Mr. McKinstry, Francisco and Eddy, and myself.

2087 Q. Francisco and Eddy?

A. Yes sir.

2088 Q. Did you mention Eddy's name yesterday?

A. I forgot his name yesterday.

2089 Q. What was Eddy?

A. He was a switchman.

2090 Q. So then, you had Francisco and Eddy as switchmen?

A. Yes sir.

2091 Q. You were foreman?

A. Yes sir.

2092 Q. And Hall, engineer?

A. Yes sir.

2093 Q. And whoever it was, as fireman?

A. And whoever it was as fireman; I don't remember his name?

2094 Q. Now, McKinstry was on what side?

A. He was on the left side of the engine coming in.

2095 Q. That would be on the inside of the curve?

A. The inside of the curve, yes sir.

2096 Q. Was he looking out?

A. Yes sir.

2097 Q. And you had previously told him that there was an extra in the yards?

A. Yes sir.

2098 Q. And McKinstry was the first to inform you that that engine was approaching?

A. Yes sir.

2099 Q. And what did he say?

A. He said, "Here they come."

2100 Q. And then what happened then?

A. Hadn't went but just a few steps until he said, "Get off, they are going to hit us."

2101 Q. What did the engineer do, if anything?

Mr. Berge: The plaintiff objects as leading and assuming, not proper cross examination.

Question withdrawn.

2102 Q. Did the engineer do anything?

A. Set the air.

2103 Q. Could you tell that?

A. Could feel it going on.

2104 Q. Explain that to the jury?

A. Just kind of slows the engine up as you are going to set the air, it slows the engine down.

2105 Q. From the time McKinstry said, "Here they come", and you felt the air being set, how far did your engine go?

A. I could not tell exactly, probably in the neighborhood of 75 or 100 feet, I could not tell exactly.

2106 Q. You had stepped off?

A. Just stepped off before this.

2107 Q. You stepped off as soon as the air was set, as soon as you felt that?

A. Yes sir.

2108 Q. Did you look to see the approach of the other engine?

299 A. I could not see it from where I stood on the right side of the engine around the curve.

2109 Q. Could you hear it?

A. No sir.

2110 Q. You could not hear it coming?

A. No sir.

2111 Q. They did not whistle, you say?

A. I did not hear any whistle?

2112 Q. And did you hear any bell rung?

A. No sir.

2113 Q. No sir; you did not hear a whistle nor you did not hear a bell?

A. No sir.

2114 Q. On #1486?

A. No sir.

2115 Q. Why did you come down from 27th street going into the yards, knowing that extra was in there and not going where it was going?

Mr. Berge: The plaintiff objects as calling for an opinion and conclusion of the witness, invading the province of the jury, not proper cross examination, and incompetent.

Overruled.

The plaintiff excepts.

A. We had a perfect right to come.

2116 Q. Now, what do you mean by that?

A. We have rights over all except first-class trains.

2117 Q. You have what?

A. We have rights over all except first-class trains.

2118 Q. Could you tell me under what rules that was?

A. No, I don't remember the number of the rule.

300 2119 Q. Could you find that in the book if I handed it to you?

A. I think so.

Mr. Berge: The plaintiff objects as not cross examination.

Overruled.

The plaintiff excepts.

2120 Q. Is that the rule, Mr. Carr, (Handing witness book), to which you refer?

Mr. Berge: The plaintiff objects to the question as not definite, he has got six or eight rules he is looking at.

2121 Q. 97-A, was the rule I referred to. Can you answer that question?

A. What question was that?

2122 Q. Is that the rule which you referred to?

A. No, I don't think it is.

2123 Q. Is that one of the rules of the Company?

A. This is one of them, yes sir.

2124 Q. You knew about that rule?

A. Yes sir.

2125 Q. But you think you refer to another rule?

A. Yes sir.

2126 Q. Well, now, in the operation of your switch engine is it one of your duties to go up on the main line?

A. Yes sir.

2127 Q. To the yard limits?

A. Yes sir.

2128 Q. You are on the main line most of the time?

A. A great deal of the time, yes sir.

2129 Q. In the yard?

A. Yes sir.

301 2130 Q. And as I understand it you look out only for first-class trains?

A. First-class trains.

2131 Q. The other trains look out for you?

A. Look out for us, yes sir.

2132 Q. Upon that morning, Mr. Carr, and the time you was coming in, was there a first-class train about to come?

A. There was a passenger due from the east in a few minutes, that is, within 15 or 20 minutes, following it in, I don't know just what time it was due there, I don't remember now.

2133 Q. You don't remember how late it was?

A. No, I don't remember just exactly.

2134 Q. Do you remember when it did come?

A. No, I don't; I don't remember.

2135 Q. And do you remember when this other engine was going to pass you?

A. I don't know, but I think about Havelock?

2136 Q. About Havelock?

A. Yes sir.

2137 Q. And how far would Havelock be from this point of the accident?

A. It would be about four miles.

2138 Q. Four miles?

A. Yes sir.

2139 Q. And the other engine #1486 was coming along to get up to Havelock?

A. Yes sir.

2140 Q. Do you recall, Mr. Carr, how long your engine was, 1220?

A. How was that?

302 2141 Q. How long was that engine?

A. Why, it was something in the neighborhood of forty feet, I don't know exactly.

2142 Q. Do you remember how heavy it was?

A. No, I don't.

2143 Q. Was it as large as engine ~~as~~ #1486?

A. No sir.

2144 Q. How much larger was the #1486 engine than the 1220 engine?

A. Well, I don't know how much larger they are.

2145 Q. How many wheels did they have?

A. Six drivers on a side,—three drivers on a side.

2146 Q. Six drivers on the inside?

A. Three drivers on a side.

2147 Q. And then they had other wheels?

A. Yes sir.

2148 Q. How many wheels in all, ten?

A. Well, let us see; there was the pony-trucks, that is four, and then the three drivers, and let us see two pair of trucks under the tank, the tender.

2149 Q. How many, ten wheels?

A. Yes sir.

2150 Q. And where are the pony trucks?

A. In under the front of the engine.

2151 Q. Just under the front end?

A. In front of the boiler, yes sir.

2152 Q. Where were you going as you came into the yards?

A. We were going down in the yards to do some more switching, some work that was undone.

2153 Q. At the time Mr. Hall put on the air, the switch engine 1220, could you feel the effect of that?

A. I could feel the engine slowing up, yes sir.

2154 Q. And how do you slow up?

A. Well, just gradually came to a slow down.

2155 Q. And had your engine #1220 stopped before the collision?

A. Why not quite, but very nearly stopped.

2156 Q. Very nearly stopped, what do you mean by that?

A. Well, it probably was not going over—

2157 Q. How far, for instance would it move before it would stop?

A. Oh, about the length of the engine.

2158 Q. About the length of the engine?

A. Yes sir.

2159 Q. Then at the time of the collision you- engine was just about to a standstill?

A. Very near it, yes.

2160 Q. Yes, you could not say, you could not gauge motion by miles per hour, could you?

A. No, I could not.

2161 Q. No; it was just about at a standstill?

A. Yes, very near to a standstill; yes sir.

2162 Q. The pony trucks of the 1220 engine, the switch engine were derailed?

A. Yes sir.

2163 Q. What caused that, Mr. Carr?

A. The jar from the other engine done that.

2164 Q. Did the other engine strike it?

A. Yes sir.

2165 Q. And could you hear it strike?

304 A. Yes sir.

2166 Q. And where were you at the time of the striking?

A. I was about 20 or 25 feet behind our engine.

2167 Q. At the side or on the track?

A. Right at the edge of the track.

2168 Q. Then you could see that engine coming?

A. No, I could not see it, it was around the curve, and by the time it had struck there was steam so I could not see.

2169 Q. But how about the striking, which engine did the striking?

A. The #1486, I think.

2170 Q. Yes, #1486 came with greater momentum than the 1220?

A. I think so.

(By Mr. Berge:)

2171 Q. But you could not see it, but you could tell.

2172 Q. You could feel that, couldn't you from where you stood?

A. Yes sir.

2173 Q. And you say that after Mr. Hall put on the air he just shot out of the cab window?

A. Yes sir.

2174 Q. You don't know what else he did?

A. No, I don't.

2175 Q. You know whether he also had reversed his engine?

A. No, I don't, I don't know.

2176 Q. Now, when the contact came, and the two engines struck together what did the #1220 do, that engine?

A. She just stayed where she was at.

2177 Q. She did not move back?

A. The jar kind of shoved her back, maybe a couple of feet, or something like that, that is all.

2178 Q. And aside from the pony trucks being off the track, what else happened?

305 A. Well, the front end was caved in, was about all.

2179 Q. And you may state again what happened to #1486?

A. Well, I could not tell much about that, in fact I did not stay there long enough to hardly look it over until after they had worked on it some because I wanted to get Mr. Wright out as soon as we could, and I went for help.

2180 Q. Yes, all of your crowd were anxious to get him out, were they not?

A. Yes sir.

2181 Q. Yes, you did everything that was possible to do there after you discovered how he was pinned in?

A. Yes sir.

2182 Q. And he was pinned in, as I understood you to say, by reason of the fact that the water tank on engine #1486, the water and coal tank, the tender as you call it, had -oved up toward the cab?

A. Yes sir.

2183 Q. And it was the end of the tank moving out of its place, coming up against the cab, that pinioned Mr. Wright between that end and the side of the cab?

A. Yes sir.

2184 Q. Now, did you have any tools on your engine?

A. No, we did not have anything of any,—

2185 Q. Do you ever have?

A. Why, not very often, no, that is, tools of that kind.

2186 Q. What?

A. Not tools of that kind.

2187 Q. Tools of the kind needed to move back that tank or to pry the cab and the tender apart, you did not carry on the switch engine, did you?

A. No sir.

306 2188 Q. Now, you had no notice or warning of the engine #1486 by any whistle or bell, excepting Mr. McKinstry, who was looking out on that side forward and told you so?

A. That is all.

2189 Q. You say now, do you, Mr. Carr, that the engine #1220 was under control, as meant by that term, and you could stop that engine and did stop it within the vision of any obstruction on the track?

A. Yes sir.

2190 Q. I think you spent some time on yesterday in talking about a rule to ride on the front end of the engine,—you say there is no rule of that kind?

A. No sir, there is no rule of that kind whatever.

2191 Q. But there is a custom that when you have got a car fastened on one man rides in between?

A. He rides on top.

2192 Q. No, in the conduct and management of your switch engine and doing the duties -evolving upon that engine, you did not carry wrecking tools, did you.

A. No sir.

2193 Q. Wrecking tools are carried with the wrecking outfit?

A. Yes sir.

2194 Q. And the Company keeps a wrecking train?

A. Yes sir.

2195 Q. No engine carries any wrecking tools, do they?

A. No sir.

2196 Q. On any of the trains, first-*class* or otherwise?

A. No sir.

2197 Q. Now, this rule about which you were talking, about not

requiring anyone to ride on the front end, they are not the  
307 written rules there, are they?

A. No sir.

2198 Q. You wish to be understood that they are your custom, in your conduct and management of the switch engine in the yard limits?

A. Yes sir.

2199 Q. You said that you could see, if I remember you correctly, standing under the viaduct on the north side of the viaduct, looking north, you could see 300 feet?

A. Well, very nearly that; yes sir.

2200 Q. That 300 feet takes, Mr. Carr, to where?

A. Well, just a little bit beyond the point of the curve, just a very little.

2201 Q. Please talk a little louder?

A. Just a little bit beyond the point of the curve.

2202 Q. Just a little bit beyond the point of the curve?

A. Yes sir.

2203 Q. How far around that object from the barn you were shown in the picture?

A. Very nearly opposite.

2204 Q. Very near opposite?

A. Very near, yes sir.

2205 Q. Then, the most abrupt point of that curve is about 300 feet from the viaduct?

A. Between 250 and 300 feet, yes sir.

2206 Q. I suppose you don't speak just accurately, you never measured it?

A. Never did, no.

2207 Q. To say the exact place of the accident?

A. Yes sir.

308 2208 Q. And did you locate it at that point now, the most abrupt?

A. It was very near south of the barn, southwest from the barn.

2209 Q. Then you started to the depot to give the alarm after the accident, and you ran down to the depot?

A. Yes sir.

2210 Q. You got back in about how long a time?

A. About 40 minutes, I guess, very near.

2211 Q. And Mr. Wright had been taken away?

A. He was taken out when I got back, yes sir.

2212 Q. And had he gone?

A. They were just taking him away.

2213 Q. Now, after the accident, Mr. Carr, what did you do further there, with this engine moved away?

A. Why, the #1486 was moved away after a little while, then we put her pony-trucks on and took our engine out of the way.

2214 Q. How was #1486 taken away?

A. She was backed.

2215 Q. Pulled away by some engine?

A. Yes sir.

2216 Q. And what did you do with the switch engine?

A. Why, we put the trucks on and then we run it in.

2217 Q. Under its own steam?

A. Yes sir.

2218 Q. Under its own steam after #1486 had been pulled away, you got out under your own steam and cleared the track?

A. Yes sir.

2219 Q. And when was that, how long after the accident?

A. Well, it must have been very nearly 4 o'clock, I should judge.

2220 Q. 4 o'clock in the afternoon?

A. Yes sir.

2221 Q. Had the passenger train come up then?

A. It was standing behind us, yes sir.

2222 Q. Waiting for you to get out of the wreck?

A. Yes sir.

2223 Q. You did not hear Mr. Wright say anything?

A. No, I did not hear him say anything at all.

2224 Q. Now, in coming from the east as you were, you said you could not see as far around that curve as you could coming from the south?

A. Well, I cannot from the point between where you first strike the curve; before you come to the bridge you can see a little ways farther than you can when you come around from the east.

Q. And why is that?

A. Well, the curve is longer on this end than on the other; not quite so sharp; you can see a little farther around to the east than you can coming west.

2225 Q. Now, Mr. Carr, coming under full control as you say you were, was there any other duty devolving upon you?

A. No sir.

2226 Q. There was no duty devolving upon you to look out for other trains, other than coming under control?

A. No sir.

2227 Q. How was it with the extra, or any other train excepting a first class train?

310 A. We had rights over all those trains.

2228 Q. And first-class—

A. Any other train excepting a first-class train had to look out for you, expecting to meet you on the track?

A. Yes sir.

2229 Q. That has been an invariable rule?

A. Yes sir.

2230 Q. And it has been in force ever since you have been foreman?

A. Yes sir.

2231 Q. For ten years for the Rock Island?

A. Yes sir.

2232 Q. And did not make an observation or did you look at your watch, and did you see the time at this place?

A. I did at the time, but I have forgotten now what time it was.

2233 Q. Did you shortly afterwards make a report?

A. Just as soon as I could get around to it, it might have been an hour, or something like that.

2234 Q. I know, but I meant in that report that you made that day, did you put it in there?

A. I think I did, yes sir.

2235 Q. And was that time accurate?

A. Yes, just a——

2236 Q. You say that not being an engineer you would not want to say in what distance a train could be stopped going at the different rates of speed?

A. No sir, I would not want to say.

2237 Q. But you know, do you, from experience, about the speed an engine is traveling?

311 Mr. Berge: The plaintiff objects as calling for a conclusion of the witness, not proper cross examination.

Sustained.

The defendant excepts.

2238 Q. What did you say, if you did say, was the rule governing the speed of switch engines in the yard?

A. There is no speed limit to a switch engine at all.

2239 Q. There is no speed limit?

A. No sir.

2240 Q. As a matter of precaution what rate of speed did you generally adopt?

Mr. Berge: The plaintiff objects as not cross examination, and immaterial.

Sustained.

The defendant excepts.

2241 Q. At the time of this accident, Mr. Carr, all of the conditions had existed, had they not, as to the curve, as to the embankment, as to the——

A. The viaduct, that existed when you took possession there as foreman of the yards, ten years ago?

Mr. Berge: The plaintiff objects as not cross examination, incompetent and immaterial.

Overruled.

The plaintiff excepts.

A. Just the same, yes sir.

2242 Q. Just the same?

A. Just the same, yes sir.

2243 Q. Did you know Otto Wright personally?

A. No; I did not know him personally.

2244 Q. Had you ever seen him before?

A. I had seen him several times.

- 2245 Q. As he passed through the yard?  
312 A. As he passed through, yes sir.  
2246 Q. But you had no acquaintance with him?  
A. No sir.

Redirect examination.

Examined by Mr. Berge for the plaintiff:

2247 Q. Under the same conditions that you have mentioned in these several years, several men were killed in that same cut?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, and as having been already ruled upon by the Court, as immaterial, the question is prejudicial.

Sustained.

The plaintiff excepts.

2248 Q. You said a little while ago you could see farther one way on that track than another. I wish you would explain to the jury how that was?

A. In looking north there, you can see a little farther around that curve from the south than you can coming from the east, a little bit farther.

2249 Q. I will ask you the same question I did yesterday. If you station you-self at the viaduct and I would be there and you told me to go on, the very minute I would pass out of your vision you would yell for me to stop, so you could not see me, and yet I could turn around and see you too?

A. You could from that one point.

2250 Q. What other point could you see?

313 A. What I mean, you can see farther, up from the viaduct by that look, around the curve than you can from the east.

2251 Q. You mean the south side of the viaduct?

A. Yes sir.

2252 Q. All right, go south of the viaduct 50 feet, and you let me walk around northward until I pass out of your vision, you yell at me to stop; I turn around, can't you see me?

A. Not from the same distance the other way, is what I am speaking of.

2253 Q. What I mean, supposing that I was standing up northward, just at a place where you can't see me anymore, just at the vision, I can look down and see to a certain point on the track?

A. Yes sir.

2254 Q. That point I can see is just exactly where you are standing?

A. Yes sir.

2255 Q. You can see me and I can see you?

A. Yes sir.

2256 Q. And that is true on every place on the curve, isn't it?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, argumentative.

Question withdrawn.

2257 Q. Wouldn't that be true every place in the curve?

A. What I have reference to, you can see farther up the track, farther going east, than you can see from the same point on the east end of the curve. That is what I have reference to. Of course you could see me.

2258 Q. Mr. Carr, the curve is exactly the same curve during the entire curve all around, the same kind of a curve, what they call here a five degree curve?

314 A. I don't know.

2259 Q. Isn't it the same curve in the track at every place?

A. Very nearly, I suppose, I don't know.

2260 Q. Now, I understood you to say a while ago in response to Judge Holmes' question that you could see about 300 feet from the viaduct north?

A. Why, very nearly that, I don't know, it is just a rough guess; I could not say exactly, but it is very nearly that.

2261 Q. And do you say the barn is back that far?

A. No, the barn is not quite that far, you can see a little ways around the curve.

2262 Q. Can't you see a long ways past the barn?

A. Not such an awful long ways.

2263 Q. The barn was not back 110 feet, was it?

A. Probably 130 or 140 feet, something like that.

2264 Q. Standing on that lot on the south side of the alley there?

A. I don't know as to that.

2265 Q. You said you had a rule, paying attention only to first-class trains?

A. Yes sir.

2266 Q. That is, the custom you have in the yard?

A. No sir, that is a rule.

2267 Q. Have you got any written rules, any printed rule that says that?

A. I don't understand the question?

2268 Q. This rule to pay attention only to first-class trains, where did you get that rule?

A. That is a printed rule.

2269 Q. For switch engines, yard engine, I would like to see that rule?

315 A. Have absolute right over all but first-class trains.

2270 Q. Where is that rule?

A. In the book there.

2271 Q. Now, you find me the rule? That is where they had it open? (Handing witness book.) Find me the rule where they say switch engines have the right over everything except first-class trains? You said a while ago, 97-A was not the rule. Now, if there is any rule, I would like to have you point it out and if you cannot point it out, say so so we can get it in the record. You find any rule anywhere that gives you as to switch engines—

Mr. Holmes: It is rule No. 16.

A. Here it is.

Mr. Holmes: Read it Mr. Carr.

Mr. Berge: Just let me examine the witness, Judge Holmes, if you please.

2272 Q. Have you found the rule?

A. Yes sir.

2273 Q. Read it?

A. "All except first-class trains will approach, enter and pass through the following named yards under full control expecting to find main track occupied or obstructed."

2274 Q. Now, does that use the word, "switch engine"?

A. It does not say the word "switch engine."

2275 Q. Does that rule refer to the switch engines?

A. Yes sir.

2276 Q. How?

A. Because they are working in the yard limits.

2277 Q. Yes, but that rule don't give switch engines right over absolutely all trains except first class trains?

316 A. Yes sir.

2278 Q. You claim it under rule 16, in Exhibit "9"?

A. Yes sir.

2279 Q. It is under that?

A. Yes sir.

2280 Q. And when you was running around that curve that day, you had in mind that rule to pay no attention to anybody except that passenger that was coming?

A. When we went around that curve we always slowed up at that curve there to save steam.

2281 Q. But you went on the theory and assumed the right that every thing had to get out of the way for you except this passenger?

A. Yes sir.

2282 Q. Although you knew the extra was in the yards?

A. Yes sir.

2283 Q. And you claim it under that rule?

A. Yes sir.

2284 Q. You don't claim it under the rule in the exhibit you have in your hand?

A. This is not the rule, no.

2285 Q. That is not the rule, 97-A is not the rule?

A. No sir.

2286 Q. You ought to run under control though in the yard limit?

A. Why, I don't see why.

2287 Q. How?

A. Other trains are supposed to look out for us.

2288 Q. Are you supposed to run under control?

A. We do in certain places.

317 Mr. Holmes: The defendant objects the witness having already answered, he did.

2289 Q. What are the rules of switch engines running under control in the yard?

A. They have the right over all except first-class trains.

2290 Q. How is that?

A. They have rights over all.

2291 Q. You answer my question, sir. What is the rule about switch engines running under control in the yard limits?

A. There is not any.

2292 Q. How?

A. There is no rule.

2293 Q. Didn't you say yesterday that you were supposed to run under control in yard limits?

Mr. Holmes: The defendant objects to this form of examination, for the reason that this is Mr. Berge's witness, and he should not cross examine him.

Overruled.

The defendant excepts.

A. Well, we are just to a certain extent, that is a rule of our own, that is, that we adopt there for safety to ourselves and other employees.

2294 Q. Have you any rule applying to switch engines about running under control?

A. No sir.

2295 Q. Then, as I understand you, when you jumped off of the engine over to the right and stepped back it ran about 50 feet until it stopped?

Mr. Holmes: The defendant objects as not proper re-direct, the witness having already answered in his previous examination.

318 Overruled.

The defendant excepts.

A. I think when I stepped off of the engine I was in the neighborhood of 20 or 25 feet from the back of the engine when they stopped.

2296 Q. Yesterday on direct examination I understood you to say 50 feet?

A. No, I think I was with some other fellows.

2297 Q. No, no, what is the fact now?

Mr. Holmes: The defendant objects as not proper re-direct examination, and having been already answered.

Overruled.

The defendant excepts.

A. It was just about 25 feet before they stopped when I got off.

2298 Q. Didn't you say yesterday, it was 50 feet?

A. I don't remember?

2299 Q. Will you say you did not?

A. I don't remember saying it?

A. Of course whatever you said is in the record. When the collision took place I understood you to say this morning that your engine had about stopped?

A. Just about stopped, yes sir.

2300 Q. You were a witness at the Coroner's inquest?

A. Yes sir.

2301 Q. For the purpose of refreshing your memory and no other purpose, didn't you say: "I would judge we were not going over 4 or 5 miles an hour when we struck the curve, but nearer this engine we got the slower we got, and I don't think we were going over to exceed 3 miles an hour at the outside when we hit"?

319 A. Yes sir.

2302 Q. Now, what is your best recollection now as to the speed of your engines when the collision took place?

A. Well, I could not tell that, I don't know.

2303 Q. Now, you said this morning there was another man on the engine by the name of Eddy?

A. Yes sir.

2304 Q. Who is he?

A. He is another one of the switchmen.

2305 Q. How?

A. He is another switchman.

2306 Q. When did it occur to you that he was on the engine?

A. I never thought of him until last evening when I gave in the names yesterday he slipped my mind.

2307 Q. Are you sure he was on that day?

A. Yes sir.

2308 Q. What makes you think so?

A. Because I know he was; he went back to flag, he was working on the engine that day.

2309 Q. At the Coroner's inquest all of your people testified, you did not mention him?

A. Well, he was there, but he was not called on.

2310 Q. I mean in your testimony, not any of your train men mentioned that he was on the engine when giving the list of the men who were on the engine. I just want to know whether you are sure that he was there?

A. Yes, he was there.

2311 Q. How can you explain then, that none of you thought he was there or mentioned it at the Coroner's inquest?

320 A. I don't know, I am sure.

2312 Q. Well, where was Eddy on 27th street this way on the engine?

A. He was on the back of the engine with us.

2313 Q. How many were standing back there?

A. Four.

2314 Q. Four in a row?

A. Yes sir.

2315 Q. All of you?

A. Yes sir.

2316 Q. Did you get off before he did?

A. No, after he did.

2317 Q. Why didn't you jump as soon as McKinsty hollered?

Mr. Holmes: The defendant objects as having been gone over several times.

Sustained.

The plaintiff excepts.

2318 Q. You said on cross examination, if I understood you, that your engine running against Mr. Wright's engine, it was not thrown backward?

A. It probably may have been moved back a couple of feet, but not to exceed that.

2319 Q. Do you know whether it threw Mr. Wright's engine backwards?

A. I don't remember whether it did or not.

2320 Q. You are certain your engine was not moved back, but a few feet, if any?

A. No sir; the reason I remember because I stepped off and stood at the edge of the track and it did not come back only a little way, maybe a couple of feet.

2321 Q. If your engine was going there, three miles an hour, or practically at a standstill and your engine did not come back only a foot or two, or two feet, it follows the other engine could

321 not have been running very fast?

A. I could not say, I don't know.

2322 Q. In understood you to say that you could feel the engine from where you stood, feel what?

A. Feel applying the air.

2323 Q. But you could not feel it standing back 25 or 50 feet back on the ground?

A. That was before I got off.

2324 Q. You felt the air going on you say, but you can't tell a thing about the reverse?

A. No sir.

2325 Q. What does a man do when he puts on the air and reverses the engine, do you know, which does he do first?

A. He puts on his air.

2326 Q. First?

A. Yes sir.

2327 Q. And what does he have to do to put the air on?

A. A little air valve there in the cab.

2328 Q. A man facing this way, what does he get hold of here?

A. Just a valve.

2329 Q. A level?

A. Yes sir.

2330 Q. Is it the same lever that reverses the engine?

A. No sir.

2331 Q. Where is the reverse lever?

A. Right along side.

2332 Q. That is a long lever sticking down?

A. Yes sir.

2333 Q. And you have to pull it back or push it forward one or the other?

322 A. Yes sir.

2334 Q. Of course putting on the air simply puts on the brakes?

A. Yes sir.

2335 Q. It does not have anything to do with the steam?

A. No sir.

2336 Q. Is it a separate act to shut off the steam?

A. Yes sir.

2337 Q. And another act to reverse the engine?

A. Yes sir.

2338 Q. If you want to stop the engine the very first minute you possible could, you would have to shut the steam off?

A. Yes sir.

2339 Q. Also put the brakes on?

A. Yes sir.

2340 Q. And to reverse the engine?

A. Yes sir.

2341 Q. Anything else you can do?

A. No sir.

2342 Q. And what you felt you think, is the brake being applied?

A. Yes sir.

2343 Q. And that is all you felt?

A. Yes sir.

2344 Q. Did I understand you to say that from the time you felt the steam going off until you stepped off you ran 75 to 100 feet?

A. From the time I stepped off until *the* stopped, no sir.

2345 Q. What did you mean by saying they ran 75 or 100 feet in response to Judge Holmes' question?

A. I don't know as I understand the question exactly.

2346 Q. You answered here that the engine ran 75 or 100 feet until you stepped off?

323 A. That is after McKinstry says, "Here she comes," yes sir.

2347 Q. After McKinstry said "Here she comes," the engine still ran 75 or 100 feet until you got off?

A. I don't know if it was that far, I could not say; something like that, yes; I don't know exactly.

2348 Q. And then, the engine ran the distance you have testified yesterday and today before the collision took place after you did jump off?

A. About 20 feet something like that.

2349 Q. Well, if you say 50 feet last night that would be right too, wouldn't it?

Mr. Holmes: The defendant objects as argumentative.

2350 Q. Do you know how far the engine ran after you stepped off until it collided with Wright's engine?

A. No; not exactly.

2351 Q. You four men standing back there in a row from 27th street on coming this way, were leaning against the engine?

- A. Standing facing the engine.  
2352 Q. All of you?  
A. Yes sir.  
2353 Q. How do you know?  
A. Because that is the way we always ride.  
2354 Q. The men in the middle have something to hold on, haven't they?  
A. Yes, there is a rod across there.  
2355 Q. What did you say Eddy was, a switchman, too?  
A. Yes sir.  
2356 Q. Is that the regular way the switch engine was run, with that number of men helping?  
324 A. No sir, not always, it is most usually three men with an engine.  
2357 Q. That is, three men including yourself?  
A. Yes sir.  
2358 Q. This time you had four including yourself?  
A. Yes sir.  
2359 Q. And of course besides you was the fireman and engineer on the train?  
A. Yes sir.  
2360 Q. Do you know where the fireman was?  
A. No sir.  
2361 Q. The switch engine had a tank behind?  
A. No, it was a square tank.  
2362 Q. So you could not see over, you could not see the fireman or engineer?  
A. Not without leaning around the side.  
2363 Q. Did you have one of those engines which was higher than your head, the water tank?  
A. Yes sir.  
2364 Q. And you may state whether you could see out unless you leaned out on the side?

Mr. Holmes: The defendant objects as incompetent, immaterial, not cross-examination,—not re-direct, and having been already answered repeatedly.

2365 Q. The engine was higher than your head, all of you?

Mr. Holmes: The defendant objects.

Court: He just said that it was, as I understood him.

325 2366 Q. Did you say that you had any rule requiring you,—supposing you had one car in front of the switch engine,—requiring one of your switchmen to ride on the front end of the train where you are switching?

A. If they have one car,—

Mr. Holmes: Turn to rule 102.

2367 Q. Read rule 102 into the record, will you, that counsel has suggested to you?

A. "When cars are pushed by an engine, except when shifting or making up trains in yard, flagman must take a conspicuous posi-

tion in the front of the leading car and signal the engineman in case of need."

Recross-examination.

Examined by Mr. Holmes for the defendant:

2368 Q. Now, Mr. Carr, you had a copy of those rules, did you?

A. Yes sir.

2369 Q. And did you have a copy of time table 11-D?

A. Yes sir.

2370 Q. At the time?

A. Yes sir.

2371 Q. And in speaking of the rules you take them both in connection?

A. Yes sir.

2372 Q. Governing the conduct of your switch engine?

A. Yes sir.

Witness excused.

326 JOSEPH H. FRANCISCO, being produced and duly sworn on behalf of the plaintiff, testified as follows.

Examined by Mr. Berge for plaintiff:

2373 Q. State your full name?

A. Joseph H. Francisco.

2374 Q. Francisco, you pronounce that?

A. Yes sir.

2375 Q. Where do you live, Mr. Francisco

A. 912 North 17th street, Lincoln, Nebraska.

2376 Q. How long have you lived here?

A. Since, I believe last August.

2377 Q. Last August?

A. Yes sir.

2378 Q. Well, were you here on December 8th, 1909?

A. Yes sir.

2379 Q. Switching then?

A. Yes sir.

2380 Q. Did you leave after that?

A. No sir.

2381 Q. I thought you said you were here since last August?

A. I said I had lived at 912 17th street since last August.

2382 Q. How long have you lived in Lincoln?

A. About seven years.

2383 Q. And what is your occupation now?

A. Switchman.

2384 Q. For what road?

A. Rock Island.

2385 Q. How long have you been employed by the Rock Island road?

A. Two years.

- 2386 Q. Are you a switchman now on a switch engine?  
A. Yes sir.
- 327 2387 Q. Where?  
A. In the Lincoln yards.
- 2388 Q. Were you one of the switchmen, of the switchmen here on December 8, 1909?  
A. Yes sir.
- 2389 Q. Acquainted with Mr. Wright were you in his life time?  
A. No sir.
- 2390 Q. Have you ever seen him?  
A. No sir.
- 2391 Q. Are you acquainted with Mr. Carr who was just upon the witness stand?  
A. Yes sir.
- 2392 Q. Now, on December 8th, 1909, afternoon, you may state the movements of your engine until the collision in a general way?  
A. Well, afternoon, I believe they left the yard and went to the B. & M. transfer and returned to 27th street from there and to only a short distance on a spur that goes to University place and we returned from there to the place of the collision.
- 2393 Q. Do you know what time it was when you started this way on that trip?  
A. The time I started from 27th street coming to Lincoln?  
Q. Yes?  
A. I do not, exactly.
- 2394 Q. Do you know the time of the collision?  
A. Not exactly.
- 2395 Q. Did you make any written memoranda at the time?  
A. I did not.
- 328 2396 Q. You have none now?  
A. No sir.
- 2397 Q. It was in the afternoon?  
A. Yes, it was afternoon.
- 2398 Q. Now, in coming in from 27th street until the collision, where were you on this engine?  
A. On the rear end.
- 2399 Q. Was it a switch engine?  
A. It was.
- 2400 Q. Did it have a foot board on the front end?  
A. It did.
- 2401 Q. Who else was with you on the rear end there?  
A. Mr. Carr, Mr. Eddy and Mr. McKinstry.
- 2402 Q. Mr. Carr, Mr. Eddy, and Mr. McKinstry and yourself?  
A. Yes sir.
- 2403 Q. Four of you?  
A. Yes sir.
- 2404 Q. And what — of the foot-board were you standing on?  
A. I stood on the left hand side, about half way between, —  
—, —.
- A. Well about a quarter of the way from the left hand side.
- 2405 Q. Westward.

A. Well, commencing on the east and going westward, and counting the men, which position did you occupy? second or third?

A. Well, if the engine faced south, I would have been the third one from the west end.

2406 Q. The third one from the west end, eastward; you would be the second one from the east westward?

A. Yes sir.

329 2407 Q. There was one man to your left?

A. Yes sir.

2408 Q. Mr. Francisco, before the collision did you see Mr. Wright's engine?

A. Yes, possibly a few seconds.

2409 Q. Before you started from 27th street, did you yourself know there was an extra in the yard?

A. I did, from being told so.

2410 Q. Who told you?

A. Mr. Carr.

2411 Q. Your foreman?

A. Yes sir.

2412 Q. What was the first knowledge that you had that the extra was coming around the curve?

A. Mr. McKinstru said, I believe that they were coming.

2413 Q. What did he say?

A. Well, I could not say in exact words; he said that there was somebody coming.

2414 Q. Well, now, let us get down, you remember better, more about it than that, don't you? If there was a collision imminent he said something warning you, and give us your best recollection?

A. To my best recollection he said, "They are coming, and get off."

2415 Q. He said, "They are coming, get off"?

A. Yes sir.

2416 Q. And you got off?

A. Yes sir.

2417 Q. Took lots of time to get off, did you?

A. Did I have lots of time?

330 2418 Q. Did you take lots of time to get off?

A. I did not.

2419 Q. The minute he first saw the engine and said something about it did you ride a while or get off?

A. Oh, I did not any longer than it took me to hear what he said to get off, that is about the time he said to get off, he stepped off and I followed him.

2420 Q. You stepped off right behind?

A. Yes sir.

2421 Q. Where did you see Mr. Carr over on the other side of the engine, where was he on the track, which way from you?

A. He was to the right hand side of me.

2422 Q. Just on a level across?

A. Well, he stood on the foot-board to my right, yes sir.

2423 Q. But after you quit the engine and stepped down on the track and when you stepped here, where was Carr?

A. Well, he stepped off after I did.

2424 Q. I am asking you where he was?

A. Well, I would say he was possibly ten feet from me.

2425 Q. Which way?

A. To the right and to the west.

2426 Q. West or south?

A. West or south.

2427 Q. And the man who was riding on the outside was McKinstry, was it?

A. To my left, yes.

2428 Q. Now, when you lit on the ground where was McKinstry?

A. He was possible five or ten feet back of me.

2429 Q. That is, he got off before you did?

A. He did, yes sir.

331 2430 Q. And then you got off?

A. Yes sir.

2431 Q. And who was the man to the right of you?

A. Mr. Carr.

2432 Q. There — four of you there?

A. Yes sir.

2433 Q. Who was to the right of you?

A. Mr. Carr.

2434 Q. And who was to the left of you?

Mr. Holmes: The defendant objects as prolonging the examination, and it is immaterial.

Overruled. The defendant excepts.

2435 Q. Who was to the left of you?

A. Mr. McKinstry.

2436 Q. Anybody else?

A. No sir.

2437 Q. Well, where was Eddy?

A. He was to the right.

2438 Q. Of you?

A. Yes sir.

2439 Q. I thought Carr was to the right of you?

A. He was.

2440 Q. Well, which one was nearest to you?

A. Mr. Carr.

2441 Q. Oh, and Eddy was on the outside?

A. Yes sir.

2442 Q. Where was Eddy when you stepped off?

A. Well, he was I should judge, he got off about the same time that I did.

2443 Q. Then, if I understand you Mr. McKinstry was  
332 back behind you, and then came you and then Eddy, and then Carr?

A. Yes sir.

2444 Q. I hand you Exhibit "8," and I will ask you to state if

you can locate where that collision took place with respect to where that barn is there?

A. Just about opposite of it.

2445 Q. When you say "opposite" you mean westward?

A. Yes, westward.

2446 Q. How long was that engine?

A. Well, I could not say.

2447 Q. When you say "westward," an engine is about 40 feet long or so, were both engines south of the barn or north of the barn or about opposite, on the average?

A. Just about opposite on the average?

2448 Q. So the center or the head-on collision, would be about opposite the barn?

A. Yes sir.

2449 Q. You say you must have seen Wright's engine a few minutes before the accident: what do you mean, "or a few seconds"?

A. Well, at the time I stepped off before they hit it was possible a few seconds that I saw the engine.

2450 Q. How could you see it, didn't you step off back of your engine on the railroad track?

A. Yes sir.

2451 Q. Or did you run to one side, the left side and see it coming?

A. I stepped off just about on the rail, just about straddle of the rail.

2452 Q. And you may tell the jury whether your engine after it collided ran on south there, whether it stood still or whether  
333 it ran northward?

A. It apparently stood still.

2453 Q. After the collision?

A. Yes sir.

2454 Q. Just an impact, and it stood still?

A. Yes sir.

2455 Q. You don't think it moved northward any?

A. I don't.

2456 Q. Or southward?

A. I do not.

2457 Q. Did you help take Mr. Wright out?

A. Did your engine whistle?

A. I believe they whistled a stop signal.

2458 Q. What?

A. I believe they did.

2459 Q. When?

A. About the time I got off, I believe.

2460 Q. You believe?

A. I think so.

2461 Q. Did a bell ring?

A. I could not say.

2462 Q. Have you any recollection of its whistling or what?

A. I have a recollection of him whistling to stop, either our engine or the other.

2463 Q. I was going to ask you how you knew which engine it was?

A. I could not say which engine?

2464 Q. You say you did not help take Mr. Wright out?

A. I did not, no sir.

2465 Q. Where did you go after the collision?

334 A. I stayed right at the place of the accident.

2466 Q. What did you do?

A. Well, after the engines came together and after I got there, up to them, why, I looked to see if there was anybody hurt, and saw Mr. Wright pinned there.

2467 Q. Then what did you do?

A. The engine at that time was moving?

A. Which way?

A. Backwards and forwards, it was moving, I believe at the time I got there, it was moving to the east.

2468 Q. Moving, how do you mean? Moving around on the track?

A. Yes sir.

2469 Q. Moving to the east, or north y-u mean?

A. To the north.

2470 Q. Which engine, whose engine?

A. #1486.

2471 Q. Wasn't it against your engine, the switch engine?

A. No sir, it was not.

2472 Q. But they had separated?

A. Yes sir, they had.

2473 Q. How far?

A. Possible the length of herself.

2474 Q. Oh, that is after the collision, his engine was thrown back about the length of herself?

A. I could not say that she was thrown back.

2475 Q. All right; but she was back, was she?

A. She was, yes sir.

2476 Q. When you say "back" you mean southward?

A. Yes sir.

335 2477 Q. About the length of herself?

A. About.

2478 Q. When you got around there, she was moving which way?

A. I believe when I got to the engine she was started eastward again.

2479 Q. Well, did they get together again?

A. They did not, no sir.

2480 Q. When she stopped how far apart were they?

A. Oh, they were possibly 25 feet.

2481 Q. Before the engine stood dead still?

A. Yes sir.

2482 Q. And finally when both engines stood dead still, they were about 25 feet apart?

A. I think they were, yes sir.

2483 Q. But you think that you- engine stood in place, did not move back at all?

A. I don't think it did.

2484 Q. What did you do when you took in the whole situation, anything?

A. I went to the other side, I believe, and looked to see who was running the engine, and then looked to see the reason why Mr. Wright was pinned.

2485 Q. And you found the coal car had slipped frontwards?

A. I did not find it at once, no sir.

2486 Q. What did you find?

A. I did not discover anything outside of that, the engine of course was mashed up on the front end to a considerable extent. I did not find that the reason he was pinned in, because the tank had slipped forward, for some possibly few minutes afterwards.

336 2487 Q. You saw him pinned in there?

A. Yes sir.

2488 Q. He was pinned on his body and one of his legs, was he?

A. I believe so.

2489 Q. Did you hear him say anything?

A. I did not.

2490 Q. Did you, yourself try to do anything there that day to get him out, or did you finally get him out?

A. I did not assist in taking him out, no sir.

2491 Q. But you was there?

A. I was there, yes sir.

2492 Q. You had no tools to start with?

A. I did not no sir.

2493 Q. Was there anybody riding on the front-foot board of your engine that day?

A. There was.

2494 Q. An engineer keeps which side of the engine?

A. The right side.

2495 Q. Have you ever ridden in an engine around that curve?

A. I don't believe I ever did.

2496 Q. In the engineer's place?

A. I don't think so.

2497 Q. You don't know to what extent a man could see on the right side, do you?

A. No sir.

2498 Q. Do you know how long it was from the time of the collision until Mr. Wright was taken out?

A. I do not by my own watch; I believe it was 40 minutes, though.

2499 Q. That curve that cut around there is a mighty dangerous place, isn't it?

337 Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, calling for the conclusion of the witness. Sustained.

The plaintiff excepts.

2500 Q. Was there a semaphore there that day in that cut anywhere?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial.

2501 Q. Or a flagman?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, not within the issues.

Sustained.

The plaintiff excepts.

2502 Q. Have you a rule about being required to whistle around in that curve with a switch engine?

A. I could not say.

2503 Q. How?

A. I could not say.

2504 Q. You testified at the Coroner's inquest?

A. Yes sir.

2505 Q. And weren't you asked: "Were you supposed to whistle when you came around that curve?" and didn't you say: "Yes sir"?

A. I don't remember.

#### Cross-examination.

Examined by Mr. Holmes for the defendant:

2506 Q. Where did you say you lived?

A. 912 North 17th street.

338 2507 Q. How long have you been in the employee of the Rock Island?

A. About 2 years.

2508 Q. All that time occupied with a yard engine in the yard work?

A. Yes sir.

2509 Q. And what time was it you started out for the B. & M. transfer at University Place?

A. I could not say the exact time, it was some time after dinner.

2510 Q. After dinner?

A. Yes sir.

2511 Q. And where did you go first?

A. Went to the B. & M. Transfer first.

2512 Q. And then over to University Place?

A. Yes, not clear to University Place.

2513 Q. And then could you tell about how long you had been gone?

A. Well, we had been gone I believe about an hour.

2514 Q. Was the foreman with you all the time, Mr. Carr?

A. He was not, no sir.

2515 Q. Where and when did he join you?

A. I believe he joined us at a short distance up the spur that goes to University Place, I could not say the exact street.

2516 Q. Were you in the yard limits at the time he joined you?

A. Yes sir.

2517 Q. And you know where the yard limits are?

A. Yes sir.

2518 Q. Where are they on the east?

A. They are about—the yard limit board, I believe is about 300 feet east of 27th street, or somewhere in that neighborhood, I could not say just exactly.

339 2519 Q. And do you know what time you started back into the Lincoln yards?

A. No sir, I do not, exactly.

2520 Q. What time do you think it was?

A. I think it was in the neighborhood of two o'clock.

2521 Q. How did you happen to start back to Lincoln, did Mr. Carr tell you to?

A. Yes sir.

2522 Q. Yes, Mr. Carr, was your conductor?

A. Yes sir.

2523 Q. And captain of that crew?

A. Yes sir.

2524 Q. You were on the east of the engine then, as it moved towards Lincoln?

A. Yes sir.

2525 Q. East or north end. In this picture to which your attention was called, Exhibit No. "8," as I understand it then, you were coming from the north?

A. From the east, yes sir.

2526 Q. From the east, yes, and after you got to the point where you can see no farther in this picture, at what rate of speed were you going there?

Mr. Berge: The plaintiff excepts as not cross examination, incompetent, immaterial.

Sustained.

The defendant excepts.

2527 Q. Where was it that your engine stopped on this picture?

A. Well, I could not say exactly, it is somewheres near that point right there. (Indicating.)

2528 Q. Somewhere near west of this house?

A. Yes sir.

340 2529 Q. How did you get off of that engine?

A. I stepped off backwards.

2530 Q. And did you fall down?

A. No sir.

2531 Q. Why didn't you?

Mr. Berge: The plaintiff objects as calling for a conclusion and opinion of the witness, not cross examination, incompetent, and immaterial.

Overruled.

The plaintiff excepts.

A. Well, because I think the reason was the engine was not moving fast enough to throw me down.

2532 Q. And do you now at what rate of speed the engine was moving when you dropped off?

Mr. Berge: The plaintiff objects as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness.  
Overruled.

The plaintiff excepts.

A. I should think it was about four miles an hour, I could not say exactly.

2533 Q. When you stepped off?

A. Yes sir.

2534 Q. Can you tell how far the engine proceeded after you stepped off?

A. It did not go the length of herself.

2535 Q. It did not?

A. I don't think so.

2536 Q. Did you have any knowledge of the engineer stopping it?

A. I did not.

2537 Q. Did you hear the setting of the air?

341 Mr. Berge: The plaintiff objects as assuming and not cross examination. Incompetent and leading.

Overruled.

The plaintiff excepts.

A. I did not.

2538 Q. But after you stepped off, the engine moved about half the length of itself?

A. About the length of herself.

2539 Q. And had the engine stopped, No. 1220, had it stopped before the collision?

A. I could not say.

2540 Q. You could not say?

A. No sir.

2541 Q. But immediately after the collision, which you think occurred right west of this house shown in the picture, marked Exhibit "8," after the engines collided you went around them to where engine #1486 was?

A. Yes sir.

2542 Q. Then, as I understand it, #1486 had started towards Lincoln again?

A. It had, yes sir.

2543 Q. And was quite a distance, how far was it from your engine, #1220?

A. At the time I got there, I believe it was about the length of herself back.

2544 Q. And was then coming towards you again?

A. Yes sir.

2545 Q. And had engine #1220 been reversed?

A. I could not say.

2546 Q. Well, wouldn't that indicate that it had not been reversed?

342 Mr. Berge: The plaintiff objects as not cross examination, incompetent, immaterial, and calling for an opinion and

conclusion of the witness, no foundation laid, invading the province of the jury.

2547 Q. I mean, instead of #1220, #1486, wouldn't that indicate that it had not been reversed?

Mr. Berge: The plaintiff objects as not cross examination, incompetent, irrelevant and immaterial, and calling for an opinion and conclusion of the witness.

Question withdrawn.

2548 Q. If engine #1486 had been reversed, Mr. Francisco, and gone south, it could not have advanced again, could she?

Mr. Berge: The plaintiff objects as not cross examination, incompetent, no foundation laid, and invading the province of the jury. Overruled.

The plaintiff excepts.

A. I could not say.

2549 Q. Could you tell, Mr. Francisco, whether the engine #1486 had moved towards Lincoln, a greater distance than when you first saw it?

Mr. Berge: The plaintiff objects as not cross examination. Overruled.

The plaintiff excepts.

A. I could not say.

2550 Q. But when you first saw it, she was coming from towards Lincoln, coming towards your engine, #1220, wasn't it?

A. It was.

2551 Q. And when you first saw it, it was then the distance of its length from that engine?

A. Yes sir.

2552 Q. Did it strike #1220 again?

A. It did not, no sir.

2553 Q. Why didn't it?

Mr. Berge: The plaintiff objects as calling for an opinion and conclusion of the witness, not cross examination, and incompetent. Overruled.

The plaintiff excepts.

A. Because it stopped before it got there.

2554 Q. How far was it from this engine before it stopped?

A. I believe it stopped about 25 feet before it would have struck 1220.

2555 Q. Did you hear the two engines come together?

A. I did, yes sir.

2556 Q. Did it make a crash?

A. It did, yes sir.

2557 Q. So that you know, or can you say whether or not the engine #1486 and struck the engine #1220?

A. Yes sir.

2558 Q. You knew they had come together?

A. I did.

2559 Q. After the engines had struck together, your engine, #1220, sto-d still did it?

A. It did, apparently, yes sir.

2560 Q. Then, when you got around there you found the two engines separated?

A. Yes sir.

2561 Q. Had any injury happened to your engine, #1220?

344 A. Yes sir.

2562 Q. What?

A. The pilot had been knocked off, and I believe the front end had been mashed in.

2563 Q. The pilot had been knocked off?

A. Yes sir.

2564 Q. How about the wheels?

A. The front trucks were off the track.

2565 Q. How far off?

A. Well, they were off the rails.

2566 Q. Were they any distance from the rails?

A. Not any great distance, it might have been a foot.

2567 Q. Might have been a foot from the rail?

A. Yes sir.

2568 Q. In this exhibit "8," there appears to be some kind of a contraption immediately west of this house by the side of the track, do you know what that is?

A. Yes sir.

2569 Q. What is that?

A. A battery jar.

2570 Q. Was that there at the time of the accident?

A. I don't believe it was.

2571 Q. So that don't help in any way to locate to point where the accident was?

A. No sir.

2572 Q. You know from what Mr. Carr told you that this engine was in the yard?

A. Yes sir.

— Q Did you think anything strange about coming into the yards and coming down to Lincoln that day?

345 Mr. Berge: The plaintiff objects as not cross examination. Sustained.

The defendant excepts.

2573 Q. As a switchman, and in connection with engine #1220, what rights, Mr. Francisco, did that engine have in the yards of the city of Lincoln?

Mr. Berge: The plaintiff objects as not cross examination.

Sustained.

The defendant excepts.

2574 Q. Now, after you had made an examination of the engine #1486, you later discovered how Mr. Wright was pinned in there?

A. Yes sir.

2575 Q. And that was because the tank of engine #1486 had been moved on its bed, had it not?

A. It had, yes sir.

2576 Q. And how far had it been moved?

A. I could not say exactly.

2577 Q. Did you make other observations there as to the injury and damage done to 1486?

A. Well, just in a general way.

2578 Q. Just tell what you discovered?

A. Well, the pilot was mashed off and I believe the trucks were off the track.

2579 Q. The trucks?

A. The pony trucks.

Q. That is 1220?

A. 1486.

2580 Q. Yes, I said 1486, do you mean that?

A. Yes sir.

346 2581 Q. How could engine 1486 be moving up and down with the wheels off the track?

Mr. Berge: The plaintiff objects as leading the witness, he said that 1486, the trucks were off the track.

A. Well, she could do that under her own steam.

2582 Q. How is that?

A. She could do it with her own steam.

2583 Q. With the wheels off the track?

A. With the pony trucks off the track, yes sir.

2584 Q. Now, Mr. Francisco, might you not be mistaken about those pony trucks being off the track?

A. I don't think I am, no sir.

2585 Q. Do you remember of having anything to do with putting them on again?

A. No, I do not.

2586 Q. But your impression is now, your memory is, that the pony trucks of both engines were off the track?

A. It is, yes sir.

2587 Q. Were you there when the- took 1486 away?

A. Yes sir.

2588 Q. They hooked on an engine from Lincoln and pulled it away, didn't they?

A. Yes sir.

2589 Q. Now, do you remember of anybody helping to put those trucks on the track again?

A. Well, I remember that they were being put on, but I did not assist in putting them on.

2590 Q. You remember that they were being put on?

347 A. Yes sir.

2591 Q. Now, the pony trucks, then, you have it, were off of the track, and the pilot smashed in?

A. Yes sir.

2592 Q. Now what about the tank?

A. The tank had slid forward on its foundation.

2593 Q. How far?

A. I could not say.

2594 Q. About how far?

A. Well, I don't believe over a foot.

2595 Q. Over a foot?

A. Yes sir.

2596 Q. Had that in any way injured any of the pipe connections of the tank?

A. I could not say.

2597 Q. Couldn't you say from the fact that the water was pouring out of there?

A. Not the pipe connections.

2598 Q. Where did the water come from?

A. Apparently came from the holes in the tank where the rivets had been.

2599 Q. Did it break those out?

A. It did, yes sir.

2600 Q. Now in moving the tank forward on its foundation, what had to happen before that could be moved?

A. Well, the fasteners had to break.

2601 Q. And can you tell us how they are fastened, what are the fastenings?

A. I could not say, no sir.

348 2602 Q. Are they fastened by planks or bolts or what?

A. From what I have seen I believe they are bolted on.

2603 Q. So that in moving the tank forward on its foundation those bolts or fasteners had to break?

A. They did, yes sir.

2604 Q. And do you know how many fasteners there are?

A. No sir, I could not say.

2605 Q. After they had taken away engine 1486 you stood there by your engine, did you?

A. Yes sir.

2606 Q. And when did you go to town, when did they move that engine?

A. Well, I could not say how long it was before they moved that engine, it was over an hour after the collision, I believe.

2607 Q. And how did they move that?

A. The 1220?

2608 Q. Yes?

A. She moved herself.

2609 Q. Under her own steam?

A. Yes sir.

2610 Q. And you went with it then to the round house, or where?

A. Into the yards, yes sir.

2611 Q. Into the yards down town. You discovered then, Mr. Francisco, that Mr. Wright was caught when the tank moved on its foundation between the end of the tank and the side of the cab?

A. Yes sir.

2612 Q. You did not get him out?

A. No sir, I did not take him out.

2613 Q. You helped?

349 A. No, I did not help take him out.

2614 Q. You saw others help?

A. Yes sir.

2615 Q. And you were able to help if you could have done any service?

A. Yes sir.

2616 Q. And it was impossible to get him out, you discovered enough to know that he could not be gotten out until the body of the tank had been moved back or the parts separated?

A. No sir, he could not have been gotten out.

Redirect examination.

Examined by Mr. Berge for the plaintiff:

2617 Q. Engine 1486 was a good deal bigger engine than the switch engine was?

A. It was some larger, yes sir.

2618 Q. And is your memory very clear about that whole situation, is your recollection good?

A. Well, it is quite clear in a general way, yes sir.

2619 Q. Now, at the Coroner's inquest I will ask you to refresh your memory to see if it will help you out any, was this question asked you: "Did you stay and help get him out,—referring to Mr. Wright"? A. Yes sir?"

A. I could not say I did not.

2620 Q. Didn't you answer, "Yes", to that kind of a question?"

A. I could not say.

2621 Q. You never talked this matter over with me?

A. No sir.

350 2622 Q. Never talked with me to your recollection?

A. No sir.

2623 Q. Talk with Judge Holmes or Mr. De Lacey?

A. No sir.

2624 Q. Did you ever see him before?

A. No sir, not to my knowledge.

Mr. Holmes: Yes, saw him at the inquest.

2625 Q. How?

A. Not to my knowledge.

2626 Q. Hope you will never see him again.

Recross-examination.

Examined by Mr. Holmes for the defendant:

2627 Q. Do you know the size of those engines?

A. No sir.

(By Mr. Berge:)

2628 Q. The number don't have anything to do with the size?

A. No- that I know of, no sir.

2629 Q. Well, do engines go by certain classes as to their size?

A. They are classed, yes sir.

2630 Q. What class engine was 1486, if you know?

A. I could not say as to the classification of the engine; it was a freight engine, that is all I could say in regard to it.

2631 Q. Had three large wheels on a side besides the pony trucks in front and besides the coal car?

A. It had six drivers, yes sir.

351 2632 Q. And your switch had twelve drivers?

A. It had six drivers.

2633 Q. Three on each side, the switch engine?

A. Yes sir.

2634 Q. And had pony trucks besides?

A. It did.

2635 Q. Was it a regular switch engine?

A. I believe it was, yes sir.

2636 Q. And do switch engines go by any classes as to their size?

A. I could not say.

2637 Q. How much larger was engine 1486?

A. I could not say.

2638 Q. So you could observe that among the first things, couldn't you?

A. Yes, if the two engines were side by side.

2639 Q. It was taller and longer, wasn't it?

A. Yes, I believe.

2640 Q. And heavier drive wheels?

A. I believe they were.

2641 Q. It was I mean higher than the switch engine?

A. Yes, I believe it was.

2642 Q. Had a larger smoke stack, did it?

A. I could not say.

2643 Q. You did not notice. Upon your direct examination you said something about whistles. Did you hear a whistle?

A. I did, yes.

2644 Q. Whereabouts were you when that whistle was made?

A. Just about the time I stepped off.

2645 Q. You don't know who whistled?

352 A. I could not say, no sir.

2646 Q. You don't know whether it was 1220 or 1486?

A. I could not say which it was.

2647 Q. You were busy about that time?

A. Yes sir.

(By Mr. Berge:)

2648 Q. You did not do anything that day except get off, did you?

A. In what way?

2649 Q. Any way, I mean of course at the time of the collision and shortly afterwards?

A. (No answer.)

Witness excused.

It now being 12.25 P. M. March 17th, 1911, Court adjourned until next Monday morning at 9.30 A. M. March 20th, 1911.

9:30 a. m., March 20th, 1911.

Court met pursuant to adjournment and the following proceedings were had and done.

353 JAMES MCKINSTRY, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for the plaintiff:

2650 Q. Give us your full name?

A. James McKinstry.

2651 Q. J. McKinstry?

A. Yes sir.

2652 Q. How old a man are you?

A. 27.

2653 Q. At the present time?

A. 26, I will be 27.

2654 Q. What is your occupation now?

A. Switchman.

2655 Q. For what road?

A. The Chicago, Rock Island & Pacific.

2656 Q. And of what, in the yards or on the road?

A. In the yards.

2657 Q. Switchman on a switch engine?

A. Yes sir.

2658 Q. You may state whether you were a switchman on a switch engine in the Rock Island yards, in the city of Lincoln, December 8, 1909?

A. I was.

2659 Q. And how long prior to that had you been?

A. Three years.

2660 Q. More than four years now, altogether?

A. Yes sir.

2661 Q. Continuously in the Lincoln yards?

354 A. Yes sir.

2662 Q. Mr. McKinstry, outside of the foreman, the switch foreman, Mr. Carr,—is he the switch foreman?

A. Yes sir.

2663 Q. Is now and was then?

A. Yes sir.

2664 Q. Are the other switchmen, do they have any rank or are they all of the same?

A. Well, the oldest men,—no, they are all the same, do the same work.

2665 Q. All the same in the work?

A. Yes sir.

2666 Q. What was you going to say about the oldest men?

A. I was going to say the oldest man had the rights, and if any were let off, he would have the right to rank up.

2667 Q. So far as promotion is concerned?

A. Yes sir.

2668 Q. But so far as the work is concerned under the foreman, Mr. Carr, they all have equal rank?

A. Yes sir.

2669 Q. Now, how long have you been railroading all together?

A. About 7 years.

2670 Q. For the Rock Island all together?

A. Yes sir.

2671 Q. Now, during the more than four years you have been in the Lincoln yards, has the service on your part been continuous or have you laid off part of the time?

A. Been continuous.

2672 Q. Were you working on December 8th, 1909, in the afternoon?

355 A. Yes sir.

2673 Q. On the switch engine?

A. Yes sir.

2674 Q. Who was your engineer at that time?

A. Mr. Hall.

2675 Q. Who was your fireman?

A. Mr. Goines.

2676 Q. And who was your foreman?

A. Mr. Carr.

2677 Q. And besides you, what other switch men were on the engine?

A. Mr. Eddy, Mr. Carr, Mr. Francisco.

2678 Q. What kind of a switch engine was it you were using at the time?

A. Well, it was a road engine made into a switch engine.

2679 Q. How?

A. It was a road engine made into a switch engine.

2680 Q. A road engine made into a switch engine?

A. Yes sir.

2681 Q. Had the usual coal car on?

A. Yes sir.

2682 Q. And the cow catcher taken off, and steps put on in front?

A. Yes sir.

2683 Q. And steps put on the rear of the coal car?

A. Yes sir.

2684 Q. And with that exception it was the usual road engine?

A. Yes sir.

2685 Q. How?

A. Yes sir.

2686 Q. Now, in the afternoon where had you been before this collision?

A. Been over to the—

356 A. Been over to the Burlington transfer.

2687 Q. What do you mean by the Burlington transfer? Explain that?

A. Well, it is a track where we deliver cars to the Burlington, cars going out on the Burlington road would be switched over from our yards.

2688 Q. In order to go to the Burlington transfer from the Rock Island main yard where would you have to go?

A. From the Rock Island main line out there by 27th street.

2689 Q. This side or beyond 27th?

A. Beyond 27th.

2690 Q. Then you would run up the Rock Island track and go in on the Burlington?

A. Yes sir.

2691 Q. State whether the Burlington line beyond 27th street down this way to the Fair Ground, how it was with respect to the Rock Island, parallel with it or how?

A. Parallel with it.

2692 Q. So in running up and back, you got on the Burlington track?

A. No, we did not get on the Burlington transfer there, we had to go away over west of town to get on the Burlington; that is the Rock Island track, where the round house used to be.

2693 Q. Where did you get on the Burlington?

A. Back by the round house.

2694 Q. When you got to 27th going north and east and stopped to go back, don't you get on the Burlington there?

A. No sir, that is what is called the Rock Island belt line.

2695 Q. Then you did not go down the Burlington line?

A. No sir.

2696 Q. We have a belt line of the Rock Island north of the city, here that reaches to Burlington?

A. Yes sir.

2697 Q. Now, when you went out was Mr. Carr with you?

A. No sir.

2698 Q. Who was there?

A. Mr. Eddy, Francisco and myself.

2699 Q. Besides the fireman and engineer?

A. Yes sir.

2700 Q. Do you remember when Mr. Carr showed up on the scene?

A. Yes sir.

2701 Q. Where were you?

A. We backed down on the University line and put on a car that was off the track, and we were down there.

2702 Q. Beyond 27th street?

A. Yes sir.

2703 Q. Do you remember when he came?

A. Yes sir.

2704 Q. What car was off the track?

A. Why, I don't know what car it was now.

2705 Q The Rock Island?

A. It was a car of coal, I don't remember the car.

2706 Q. Car of coal, but I mean on the Rock Island track?

A. Yes sir.

2707 Q. *Do* you *had* anything to do with that out there, your switch engine?

Mr. Holmes: The defendant objects as wholly immaterial.

2708 Q. Now, did you see Mr. Carr out there?

A. Yes sir.

2709 Q. Did he say anything to you and the rest of the men about an extra in the yards down town?

Mr. Holmes: The defendant objects as leading.

2710 Q. Tell what he said about it?

A. Well, when we seen the car was not ready to pull we came back and got on the main line at 27th street and he told us there was a light engine in town.

2711 Q. Who, "he"?

A. Mr. Carr.

2712 Q. What did he tell you?

A. He told us there was a light engine in town.

2713 Q. There was a light engine in town?

A. Yes sir.

2714 Q. Is that all he said?

A. That is all, that is all he said to me.

2715 Q. Well, he told you, did he?

A. He told me.

2716 Q. You knew about it?

A. Yes sir.

2717 Q. State where you were when you were informed of a light engine in town, were you beyond 27th or this side?

Q. Well, just beyond 27th a little ways.

2718 Q. Then in running beyond 27th street up to the collision did you yourself have any knowledge of a light engine being in the yards?

A. I did.

2719 Q. You knew about it. Did you hear Mr. Carr tell this to the other train crew there?

A. No sir.

2720 Q. But you knew it?

359 A. I knowed it.

2721 Q. Do you know where the corporate limits are of the city of Lincoln?

A. I do not.

2722 Q. Now, did you occupy the same position from 27th street up to the time of the collision?

A. I did.

2723 Q. You may state whether all of the men did?

A. They did.

2724 Q. And where was your position?

A. On the back foot-board on the left hand side.

2725 Q. Left hand side coming this way?

A. Yes sir.

2726 Q. That would be on which side, the west side, or east side, if the engine was going south?

A. It would be on the east side.

2727 Q. I wish you would describe the foot-board and the rod there, that you take hold of, to the jury briefly?

Mr. Holmes: The defendant objects as immaterial.

Overruled. The defendant excepts.

A. Well, the foot-board on the back end of the tank is a board, I should judge about 12 or 16 inches wide, runs clear across the tank and at the back end of the tank clear across.

2728 Q. State whether it is as wide as the tank itself?

A. It is as long as the tank is wide.

2729 Q. Well, say that this table here is the tank?

A. Yes.

2730 Q. Now, does the tank project past the tracks?

A. Yes, past the rails.

360 2731 Q. Past the rail, I mean?

A. Yes sir.

2732 Q. That is, the tank is wider than the rails?

A. Yes sir.

2733 Q. The tank is the widest thing at the rear end of the engine, isn't it?

A. Yes sir.

2734 Q. Now, that foot-board, state how far, that comes out with respect to the tank?

A. Comes right even, supposed to come right even.

2735 Q. Isn't there a rod where you take hold of?

A. Yes sir.

2736 Q. Tell the jury where that rod is, if it is a straight engine?

A. Well a rod on the corner of the tank stands up and down on the corner of the tank.

2737 Q. Does it run up and down or cross ways?

A. There is one runs cross ways and one up and down.

2738 Q. The one that runs up and down, where does it run?

A. A little grab iron there at the corner of the tank.

2739 Q. At the back end or side?

A. On the corner where the tank makes a curve, on the corner there, right on the corner.

2740 Q. Is the foot-board round or is it square?

A. Square.

2741 Q. You are sure about that?

A. Yes sir.

2742 Q. And you say there is a cross rod?

A. Yes sir.

2743 Q. And how high from the foot board is that?

A. Well, it is right on the base of the tank, right on the  
361 frame.

2744 Q. You mean at the bottom of the tank?

A. Yes sir.

2745 Q. Then the rod is at the bottom of the tank?

A. Yes sir.

2746 Q. How far up would that be from the foot-board?

A. About three feet, I guess, or three and a half.

2747 Q. How far is the foot-board from the top of the rails?

A. I don't know, that varies.

2748 Q. Well, on this engine?

A. Oh, I suppose about 6 inches from the rails.

2749 Q. Then the foot-board is quite low and you think about  
three feet up from the bottom of the tank where this rod runs  
across?

A. Yes sir.

2750 Q. How high is the tank, we will say your height, how  
high are you?

A. About five foot three.

2751 Q. And how much higher is the tank than you are on  
this particular engine, about?

A. You mean from the ground?

2752 Q. Now, when you stand on the foot-board?

A. Well, it is about four feet high.

2753 Q. Four feet higher than you are. Well, how *wide* do you  
say the foot board was?

A. Well, 12 or 16 or 18 inches wide.

2754 Q. Then you would have to hold on, and your face would  
be right up against the tank here, wouldn't it?

A. Not necessarily.

2755 Q. How?

362 A. It depends.

2756 Q. It keeps you pretty busy to hang on there,  
doesn't it?

A. No sir, you can stand on there without hanging onto any  
thing.

2757 Q. You can?

A. Yes sir.

2758 Q. Without using the rod at all?

A. Yes sir.

2759 Q. And how were you standing and how were the rest of  
the men standing going from 27th street up to the time of the col-  
lision, were they standing without taking hold of the rod or how?

A. They all had hold of the rod.

2760 Q. Facing which way?

A. Well, they was facing towards the tank.

2761 Q. How?

A. They were facing towards the tank.

2762 Q. You had gone around that curve a good many times?

A. I have.

2763 Q. Was there a front foot-board on the front of this engine?

A. There was.

2764 Q. Anybody on the front foot-board?

A. No sir.

2765 Q. On which side of the engine was the engineer on?

A. Right hand side.

2766 Q. And the fireman where?

A. Left hand side.

2767 Q. Before the collision that day with the extra did you see the extra?

A. Yes sir; I seen them just before they hit.

363 2768 Q. Just before they hit, how long before?

A. Oh, I could not say to that, it was not very long.

2769 Q. Well, did you see them just as they hit?

A. I did.

2770 Q. Well, you say you saw them just as they hit, were you on the engine?

A. No sir.

2771 Q. You may state whether you jumped immediately when you saw the train coming from the other way?

A. I did.

2772 Q. Right at the moment, as soon as you could get off?

A. Yes sir.

2773 Q. As quick as you could get off; and how far were they apart?

A. Between 300 and 350 feet.

(By Mr. Holmes:)

2774 Q. How far do you say?

A. Between 300 and 350 feet, I should judge.

2775 Q. And did you jump off right away?

A. I stepped off, yes sir.

2776 Q. Who was the first one that got off from that foot board?

A. I was.

2777 Q. Who got off next?

A. Well, I don't remember it was Eddy or Francisco, one of them.

2778 Q. When you saw the engine did you say anything?

A. I did.

2779 Q. What did you say?

A. I said, "Get off, here comes that extra."

2780 Q. What?

A. "I says, "Get off, here comes that extra."

364 2781 Q. "Get off, there comes an extra," is that just the way you said it?

A. Something like that; I don't remember just what it was.

2782 Q. Let me refresh your memory, did you say: "There she is," did you use that language?

A. I don't know whether I did or not.

2783 Q. How?

A. I don't know whether I did or not, I just told them to get off, there comes the extra.

2784 Q. Did you say it loud?

A. I yelled.

2785 Q. And you got off that very minute?

A. Yes sir.

2786 Q. Had you heard any whistle?

A. I had not.

2787 Q. Had you heard any bell?

A. I had not.

2788 Q. You don't know who got off after you did?

A. I don't know, either Eddy or Francisco, one of them two.

2789 Q. Well, but do you know, would you be willing to state?

A. I don't know.

2790 Q. From the time you saw the engine to the time you lit on the ground how far did your engine run?

A. Between 75 and 100 feet.

2791 Q. Your engine ran between 75 and 100 feet, between the time that you first saw her and the time you stepped off on the ground, that is right, is it?

A. From the time I stepped off, no, I thought you meant when they hit.

2792 Q. How?

365 A. No, I don't know how far they ran from the time I first seen them until I stepped off.

2793 Q. When you said 75 or 100 feet then, you mean after you got off, she ran 75 or 100 feet, before the collision?

Mr. Holmes: The defendant objects as not what the witness said.

2794 Q. What do you mean by 75 or 100 feet, explain it?

A. I meant that after I stepped off she ran that far before they hit.

2795 Q. How far did they run between the time that you first saw the engine and you stepped off?

A. Well, I don't believe they ran hardly any, I could not say.

2796 Q. How?

A. I could not say as to that, it was just a small space.

2797 Q. Where did you step off?

A. I stepped off right on the inside of the curve.

2798 Q. Did you step off on the inside or outside of the rail?

A. On the outside of the rail.

2799 Q. Well, when you stepped off there did you see those three partners of yours standing around there ahead of you or back of you?

A. I seen them stepping off, I don't just remember who I saw first.

2800 Q. But you are sure you got off first?

A. I am sure I got off first.

2801 Q. All they knew about the extra was what you told them from the signal that you gave? You are the only man that saw it, I mean on the back foot-board?

366 A. Yes, I am the only that saw them coming.  
2802 Q. You were pretty well scared?

A. Why, I was not scared, no, not at the time.

2803 Q. Well, I was seeing whether you could not tell me about how far she ran. What is your best judgment between the time you first saw her and stepped off?

A. Well, I could not say to that, she might have run two feet and she might have run five feet.

2804 Q. How?

A. I could not say as to that; she might have run two feet and might have run five feet: she did not run very far.

2805 Q. You got off the minute you saw it?

A. Yes sir.

2806 Q. When you first saw the extra coming towards you, tell the jury from the place where you stood, whether you could see the viaduct?

A. I could see the top of the viaduct, yes sir.

2807 Q. How?

A. I could see the top of the viaduct.

2808 Q. You could see?

A. Yes sir.

2809 Q. The top of the viaduct?

A. Yes sir.

2810 Q. Well, if you could see the top of the viaduct when you first saw Mr. Wright's engine, then Mr. Wright's engine was north of the viaduct or under it or south of it?

A. Well, north of the viaduct.

2811 Q. North of the viaduct?

A. Yes sir.

2812 Q. And when you first saw Mr. Wright's engine, how far north of the viaduct would you say his engine was?

367 A. I could not say as to that.

2813 Q. Well, give me your best judgment?

A. I don't know, it must have been about the length of itself.

2814 Q. How?

A. It must have been about the length of itself, I guess.

2815 Q. Fifty feet?

A. Somewhere along there, fifty.

2816 Q. Then, if I understand you, when you first saw Mr. Wright's engine you think Mr. Wright was fifty feet north of the viaduct?

A. Yes, 50 or 75 feet, I should judge.

2817 Q. 50 or 75 feet north of the viaduct?

A. Yes sir.

2818 Q. You never talked with me about this or I did not with you?

A. I did not.

(By Mr. Holmes:)

2819 Q. Why do you try to show that with every witness, Mr. Berge?

2820 Q. Exhibit No. "8," I call your attention — it and will ask you whether you remember on the east side of the Rock Island track, and north of the viaduct, do you remember that building over there?

A. I do; there is some buildings there, I don't know whether them is the ones or not, they are like that.

2821 Q. Well, you remember there are some buildings there?

A. Yes sir.

2822 Q. Now, tell the jury where the collision actually took place with respect to those buildings?

A. Well, our engine was about even with them, if not a little bit north.

368 2823 Q. I don't think the jury hear you. Speak loud please?

A. Our engine was a little bit north of them buildings, I should judge, or about even with them.

2824 Q. A little bit north or about even with them, and where was Mr. Wright's engine?

A. Mr. Wright's engine was about 35 or 40 feet this side of it.

2825 Q. 35 or 40 feet this side, you mean the south side of the building?

A. Yes, this side of our engine.

2826 Q. This side of your engine?

A. Yes sir.

2827 Q. Where would Mr. Wright's engine be with respect to these buildings on exhibit "8"?

A. South of those buildings.

2828 Q. You have been around there the last week or so, around that curve?

A. I have.

2829 Q. Those buildings are in the same place they were in 1909?

A. They are.

2830 Q. They are?

A. Yes sir.

2831 Q. Mr. McKinstry, did you see the actual collision of the engines? Tell the jury whether after the collision and when both engines came to a standstill, whether they were riveted together or whether they were separated?

A. They were separated.

2832 Q. How far were they apart?

A. 35 or 40 feet apart, I should judge.

369 2833 Q. 35 or 40 feet?

A. Yes sir.

2834 Q. You may tell the jury whether both engines were on the track?

A. Well, our engine had the pony trucks off.

2835 Q. How?

A. They was all on the track except the pony trucks of our engine, the front pony trucks of Mr. Wright's engine.

2836 Q. Both pony trucks were off the track?

A. Yes sir.

2837 Q. Of both engines?

A. Yes sir.

2838 Q. What do you mean by the "pony trucks"?

A. The engine trucks, the little trucks up in front of the drivers.

2839 Q. There are two on each side, four all together.

A. Yes sir.

2840 Q. Regular trucks under the front end of the engine?

A. Yes sir.

2841 Q. Those wheels are about how high?

A. I could not say to that, I never measured them, small wheels.

2842 Q. Now, as to the collision, which one of the engines moved, or both of them, or how, explain to the jury the movement of the engine if you can, after the collision?

A. Mr. Wright's engine was backing up after we hit.

2843 Q. With the trucks off?

A. Yes sir.

2844 Q. How about your engine?

370 A. Our engine stood still.

2845 Q. With the trucks off; did your engine rock back at all?

A. It did not run back any.

2846 Q. None at all?

A. No sir.

2847 Q. Were all of the pony trucks of both engines off from the track?

A. No sir.

2848 Q. Explain to the jury to what extent they were off?

A. Well, on our engine both wheels was off.

2849 Q. You mean both wheels, all four?

A. Yes sir.

2850 Q. And on which side were they, to the east or to the west?

A. To the west.

2851 Q. They were to the west?

A. Yes sir.

2852 Q. Then, your engine, the front end was thrown?

A. Not thrown, the pony trucks dropped off the rails.

2853 Q. If the pony trucks were off the whole front of the engine, it would go westward?

A. Yes, swing a little bit.

2854 Q. How far were the pony trucks off of the track?

A. Right beside the rail.

2855 Q. All four wheels?

A. Yes sir.

2856 Q. How about Wright's engine?

A. His front pair of wheels, of the pony trucks was off.

2857 Q. His front pair, that is to say the one over on this side, and one over on this side (Indicating) both of them off?

A. Yes sir.

371 2858 Q. And on which side?

A. They was on the west side.

2859 Q. Well, is it possible to take the two front wheels off and leave the two rear ones on?

A. Yes sir.

2860 Q. Those were off that way?

A. Yes sir.

2861 Q. You think Mr. Wright's engine when it came to a standstill, was how many feet south of that building I showed you on Exhibit "8"?

A. I don't remember, how far south of that building.

2862 Q. South of the building I mean?

A. Oh, it was south of the building some, I don't know how much.

2863 Q. Well, your engine stood about on a level with it?

A. About level or a little bit north.

2864 Q. Well, are you real certain about the place?

A. I am.

2865 Q. Well, will you say, was it on a level or wasn't it?

A. Well, it was not, it was a little north; our front end was a little north of the building.

2866 Q. But when you first saw Mr. Wright's engine you said you could not see the viaduct, only the top of it, is all, the top of the viaduct?

A. Only the top of it, that is all, the top of the viaduct.

2867 Q. You may tell the jury whether you could see the track clear to the viaduct?

A. Could not.

2868 Q. In looking along the track how far would you say you would see the track north of the viaduct?

A. About 150 feet, somewhere along in there.

2869 Q. Well, then, you must have been when you first saw Mr. Wright, you must have been 400 feet north of the viaduct, four or five hundred feet?

A. Well, I don't know, about 350 or 400, somewhere along there.

2870 Q. When you first saw Mr. Wright's engine?

A. Yes sir.

2871 Q. And at that same time you think Mr. Wright's engine was 40 or 50 feet north of the viaduct, or 75 feet, what do you say about it?

A. What, his engine north of the viaduct?

2872 Q. Yes, when you first lit your eyes on it?

A. About 40 or 50 feet.

2873 Q. Did you go up there to the engine after the collision?

A. I did.

2874 Q. To Mr. Wright's engine?

A. Yes sir.

2875 Q. Tell the jury which way you went to get to Mr. Wright's engine?

A. Well, I crossed the track and ran on the north side of the tracks down by the engines.

2876 Q. I don't believe the jury can hear you. Did you go south on the east or west side of the track?

A. I went on the north and west side of the track.

2877 Q. Well, did you cross in front or behind your engine?

A. Behind it.

2878 Q. Did you see Mr. Carr or these other switchmen around there on your way up there; what is your recollection?

A. Well, I seen Mr. Francisco, he ran up there with me.

373 2879 Q. Did you overtake him or he overtake you?

A. I overtook him.

2880 Q. And then you went southward on the west side of your engine?

A. Yes sir.

2881 Q. Passed it clear down to the Wright engine, did you?

A. Yes sir.

2882 Q. Did you see Mr. Wright there?

A. I did.

2883 Q. Did you know him personally?

A. I did not.

2884 Q. Did you have any talk with him that day?

A. I did not.

2885 Q. Did you do anything to get him out?

A. I did.

2886 Q. What?

A. Well, when I first got there I went up and telephoned for an ambulance and doctor, that lady,—that lady telephoned.

2887. Q. Are you the man that went over to the house to the right to telephone?

A. I did not.

2888 Q. Where did you go to telephone?

A. I went up on the east side of the viaduct?

2889 Q. Do you remember in whose house you went?

A. No, I don't know, I don't know, the second or the third house.

2890 Q. Before you went for the ambulance, did you stop there and do anything to get Mr. Wright out?

A. I did; his engine was moving ahead, and I picked up a chunk of wood and put it under the tank wheels; I thought

374 maybe the tank would pull away and leave him drop out.

2891 Q. You say the tank was moving ahead, which way?

A. East, north and east.

2892 Q. And you say you put a block of wood under the wheels on the rail?

A. Yes sir.

2893 Q. What else did you do when you went for the ambulance?

A. That is all, when I saw I could not chalk the tank, I ran for the doctor.

2894 Q. Can't hear?

A. That is all, when I seen I could not chalk the tank, I went up and had the lady phone for the ambulance.

2895 Q. Did you do that?

A. I did.

2896 Q. Come back?

A. Yes sir.

2897 Q. See Mr. Wright when you came back?

A. I did.

2898 Q. Were you there all the whole time until he was taken out?

A. I was.

2899 Q. How long was it?

A. Between 35 and 50 minutes, I should judge.

2900 Q. It was a long time, wasn't it?

A. It was.

2901 Q. Why didn't you take him out before?

A. Could not get him out.

2902 Q. Did you try?

A. I did.

2903 Q. Did you have any tools around there to get him out with?

A. I had a coal pick, is all.

375 2904 Q. How?

A. I just had a coal pick.

2905 Q. Did you have any jacks on either engine?

A. Did not.

2906 Q. Did you have any chains or anything?

A. Did not.

2907 Q. Did you have anything besides a coal pick?

A. That is all.

2908 Q. When he was finally taken out, the jacks were put under the coal car and the engine and both raised up?

A. They was not.

2909 Q. Tell the jury how he was finally gotten out?

A. I got hold of a little screw jack and I worked it underneath the tank, between the tank and the cab, or frame of the engine; we had a big track jack and worked it up against the cab, and the top of the tank over against Mr. Wright's head and turned it back.

2910 Q. If this was the coal car, (Indicating) and the engine this way, representing this paper, and Wright was between, you put a jack under this car that way? (Indicating.)

A. No sir.

2911 Q. How then?

A. Put it sideways so the jack would push the tank back.

2912 Q. Did you put it below him and against here, and here and push it back that way?

A. Yes sir.

2913 Q. And one above his head?

A. Yes sir.

2914 Q. Did that with two jacks?

A. I did not, I worked the little jack down underneath  
376 and the rest of them the top jack.

2915 Q. There were two jacks, the little one below where you worked and the one above his head?

A. Yes sir.

2916 Q. And you simply jacked the engine and coal car apart?

A. Yes sir.

2917 Q. And that let him out?

A. Yes sir.

2918 Q. Where did you get those jacks?

A. Got them up on the yard.

2919 Q. They got them over at the Burlington yard, didn't they?

A. They did not.

2920 Q. They were Rock Island jacks, were they?

A. Yes sir.

2921 Q. Explain to the jury where Wright was fastened so he could not get out.

A. Fastened between the tank and the cab.

2922 Q. Where was his body caught?

A. Fastened right through the hips.

2923 Q. Above the hips or below?

A. Right in the hips.

2924 Q. State which way he was facing, north and south or east and west?

A. Facing west.

2925 Q. Was one of his legs caught in between the tank and the engine do you know?

A. One of his legs, no they was not caught.

2926 Q. Besides his hips?

A. They was not.

377 2927 Q. Did you hear him talk at all?

A. I heard him say a few words.

2928 Q. You say you did?

A. Yes sir.

2929 Q. Was there any water running onto him?

A. There was not.

2930 Q. Any cold water or warm water?

A. No sir.

2931 Q. Wasn't the water running on his feet?

A. No sir.

2932 Q. You finally helped take him out and carry him to the ambulance?

A. I helped get him out and did not carry him; I was too wet for that.

2933 Q. Did you go with him to the hospital?

A. I did not.

2934 Q. Did you ever see him again after that? alive?

A. No sir.

2935 Q. You say you had no acquaintance with him personally?

A. No, only just when I see him go through town, spoke to him, talked to him lots of times.

2936 Q. Speak a little louder?

A. Nothing only when I seen him go through town, I talked to him several times, and spoke to him, that is all.

2937 Q. When you got off, did you fall off?

A. No sir.

2938 Q. You just stepped backwards?

A. Stepped off?

Q. What was the number of your engine?

A. 1220.

378 2939 Q. What was the number of Mr. Wright's engine?

A. 1486.

2940 Q. Did you see the fireman get off?

A. No, I did not see him; I seen him start to get off but I did not see him light.

2941 Q. How?

A. I seen him start to get off, but I did not see him get off.

2942 Q. Well, did he get off before you did?

A. No sir.

2943 Q. Do you know what the fireman was doing when you yelled, to get off?

A. Why, he was looking out of the window.

2944 Q. How?

A. He was looking out of the window.

2945 Q. Well, did you see him do that?

A. I seen him looking out of the window when they came along.

2946 Q. Didn't he see the engine before you did?

A. I don't know.

2947 Q. What was his name?

A. Goines.

2948 Q. You saw him looking out of the window, did you?

A. Yes, I saw him looking out of the window.

2949 Q. You could not tell how fast Mr. Wright's engine was going?

A. I could not.

2950 Q. You could not say anything about it here today, could you?

A. No.

2951 Q. Could you see your engineer?

A. I could not.

2952 Q. Do you know what he was doing?

379 A. I do not.

2953 Q. You say you saw the fireman; well, didn't you see him get off?

A. No, I did not see him get off.

2954 Q. Do you know how he landed?

A. I do not.

2955 Q. Now, just to refresh your memory, you testified at the Coroner's inquest?

A. Yes sir.

2956 Q. How?

A. Yes sir.

2957 Q. I will ask you whether you were asked this question: "Well, did you see the fireman jump?" and your answer was, "I saw the fireman get off," what is your recollection now after I read that?

A. Well, that don't seem right; I seen him get out of the engine.

2958 Q. Was this question asked you, "Did he fall?" and your

answer was, "Yes, he fell." What is your recollection now after I read that?

A. I don't remember.

2959 Q. How?

A. I don't remember.

2960 Q. Well, your memory then would probably be better than now?

A. It would.

2961 Q. And about your engine, did you see him get off at all?

A. I did not, I seen him light is all.

2962 Q. Didn't you when you jumped off, didn't you run over and didn't you see him fall off on the right side?

380 A. I seen him light, I did not see him get off.

2963 Q. Did he fall?

A. He did.

2964 Q. He did, was there any snow on the ground?

A. There was.

2965 Q. You saw him light, how could you see from where you were?

A. I was standing back there and I was watching for him to get off, and I did not see him get off, just looked straight down, you could see him light.

2966 Q. That is the engine passed away after he lit?

A. Yes sir.

2967 Q. Then can you tell the jury how he fell?

A. He fell right on his shoulders and the back of his neck.

2968 Q. How long is a car?

A. 36 feet, to 50 feet.

2969 Q. I will ask you this question, and I will say to you that it is the same question that was asked of you at the Coroner's inquest?

Mr. Holmes: The defendant objects to that form of question; there is no evidence here of its being a question asked at the inquest. I have no objection to his refreshing the memory of the witness.

Question withdrawn.

2970 Q. Mr. Wright's engine, as far as your observation went, as you have testified, did it appear to you that the engine was under control?

A. I could not say.

2971 Q. At the Coroner's inquest, I will ask you for the purpose of refreshing your memory whether this question was asked  
381 you,—“Did it appear to you that that engine was under control?”. Your answer was, “Which, 1486?”,—and the question was, “Yes sir?”—and you said, “Well, it was to a certain extent.” Did you answer that, what is your recollection?

A. I don't remember.

2972 Q. What do you understand by, “under control”?

A. Stop within the distance you can see the track is clear.

2973 Q. That is, stop within the distance you can see the track is clear?

A. Yes sir.

2974 Q. Have you ever been an engineer?

A. I have not.

2975 Q. Do you know whether engines alone, engines without any cars, whether there is any difference as to how quick you can stop them going at different rates of speed?

A. I do not.

2976 Q. You don't know?

A. No sir.

2977 Q. Was your engine larger or smaller than Mr. Wright's engine?

A. Smaller.

2978 Q. How much smaller?

A. I could not say.

2979 Q. Do they go by classes, the various engines, what class did your engine belong to?

A. I don't know, I don't know the class, 1220 size.

2980 Q. Was it considerably larger than Mr. Wright's engine?

A. It was small- then Wright's engine.

2981 Q. How?

A. It was the next size to Wright's engine, smaller.

382 2982 Q. What is the difference in size so far as weight is concerned, do you know?

A. No, I don't.

2983 Q. Now, Wright's was a larger engine than your engine?

A. Yes sir.

2984 Q. Now, Mr. McKinstry, in going northward, we will commence down at the Missouri Pacific crossing or the Interurban down in there somewheres and just about the time the curve begins and approaching the viaduct from the south northward, have you gone through that way a good many times?

A. I have.

2985 Q. And have you observed the viaduct in going northward?

A. A little.

2986 Q. How?

A. I have.

2987 Q. Do you know about how near those pillars, or those posts are on the east side of the track under the viaduct, how far they are from the road bed in the track, the rails?

A. No sir.

2988 Q. There are quite a number of posts in there, around there?

A. There are.

2989 Q. Coming around from the south can you see anything much beyond the viaduct from southward going northward?

A. I don't remember how far we can see going northward,

2990 Q. Well, you may tell the jury whether or not those posts under that viaduct coming from the south northward, before you reach the viaduct, whether they are an obstruction to the view or not on the east side?

A. Well, they are a little I should judge.

383 2991 Q. How?

A. Well, they are a little, I should judge, out of the cab, I don't know, I never rode in the cab, but they ain't on the foot-board where I generally ride.

2992 Q. What do you say about the foot-board?

A. They don't bother us on the foot-board, or box-car because we can step over to one side.

2993 Q. If you are on which side of the engine?

A. On the right hand side of the engine.

2994 Q. Well, if you are riding on the front foot-board you can see?

A. Yes sir.

2995 Q. You can; you can step to the side westward on the front foot-board?

A. Yes sir.

2996 Q. Suppose you are riding on the rear foot-board, standing on the righthand side, the east side, what about riding on the rear foot-board as to those posts under the viaduct?

A. I don't know about that I never looked that way.

2997 Q. Well, haven't you gone around with your switch engine on that same place looking?

A. I have.

2998 Q. Can't you tell the jury whether it would be an obstruction or not?

A. I never thought about seeing whether it did or not.

2999 Q. Never thought about it?

A. No sir.

3000 Q. Do you know whether or not the engineer on your engine running southward that day could see ahead very far on the west side?

A. I don't know.

384 3001 Q. Did you ever ride in the engine?

A. I did not.

3002 Q. Did you ever ride on the foot-board on the right side to see whether a man can see around that?

A. I have.

3003 Q. Can a man see ahead at all?

A. I don't know how far he can see.

3004 Q. Can he see ahead at all on the track around the curve?

A. Oh, he can see to a certain extent, I don't know how far.

3005 Q. You don't know how far?

A. No sir.

3006 Q. Well, you are the only man that day that saw that other engine, aren't you?

A. I don't know.

3007 Q. So far as you know?

A. No, the foreman seen it, I guess, the fireman seen it I guess.

3008 Q. Didn't you say you had some anxiety about the fireman and engineer getting out?

A. Yes sir.

3009 Q. You yelled to them?

A. I did not yell to them, no.

3010 Q. Who did you yell to?

A. To the switchman, on the back end, foot-board.

3011 Q. Didn't you say you thought they was not going to get out?

A. I said I thought the engineer was not going to get out. I did not know whether he seen it or was caught up there, or what; I was looking for him.

3012 Q. Before you stepped off, had or had not your engine slackened its speed?

A. It had.

3013 Q. Slackened its speed from what, from where?

A. From the time we entered the cut.

3014 Q. No, I don't mean about that, but I mean from the time you stepped off, at the time you stepped off had the engine slackened its speed any on account of the other engine approaching?

A. I could not say.

3015 Q. Well, what is your best recollection. You felt no air going on?

A. No sir.

3016 Q. You felt no reverse of the engine?

A. I did not; I was not on the engine.

3017 Q. I mean before you got off and when you were on, you felt none?

A. I didn't feel any, no.

3018 Q. When you are standing on the engine you can tell when the reverse lever goes on can't you?

A. Yes sir.

3019 Q. Could you tell when the steam is shut off?

A. I cannot.

3020 Q. Can you tell when the brakes go on?

A. You can.

3021 Q. While you was still on the engine you felt none of those operations on the engine by the engineer, did you?

A. I did not.

3022 Q. How fast were you going when you struck the curve?

A. Going about five miles an hour. You mean when we entered the cut?

3023 Q. Yes?

386 A. When we entered the cut, going about ten miles an hour when we entered the cut, I should say.

3024 Q. Ten miles an hour when you entered the cut?

A. Yes sir.

3025 Q. How fast were you going do you think when you got off?

A. Well, going between three and five miles an hour, I should judge.

3026 Q. How?

A. Between three and five miles an hour when I got off.

3027 Q. Just this question for the purpose of being clear myself. Can you tell the jury the exact language you used or as near as you

can and all of the language you used when you first saw this engine, what you said to the men?

Mr. Holmes: The defendant objects, as having been already answered.

Question withdrawn.

3028 Q. Will you say that you did not say, "There she is."?

A. I don't remember what I said, I told them to get off and told them what was coming, I don't remember how I worded it.

3029 Q. Did you tell them what was coming?

A. I suppose I did.

3030 Q. What did you tell them was coming?

A. I don't remember whether I said "There comes an extra or that extra", I don't know, I don't remember, I told them there was something coming.

3031 Q. Told them there was something coming?

A. Yes sir.

3032 Q. Wasn't anybody hurt there that day, except Mr. Wright, was there?

387 A. That is all.

Cross-examination.

Examined by Mr. Holmes for the defendant:

3033 Q. You have been working for the Rock Island how long?

A. All together about seven years.

3034 Q. Seven years?

A. Yes sir.

3035 Q. I wish you would speak up a little louder?

3036 Q. A. What are your duties?

A. Switchman in the yards?

3037 Q. A. In the yards?

A. Yes sir.

3038 Q. Were you in the yards all the time December 8th, with the exception of the time you were out on the transfer?

A. Well, I don't just remember where we was out that day but I was with the engine whenever the engine was around in the yards there, and in the yard limits.

3039 Q. Well, at the time of this collision were you in the yard?

A. We was.

3040 Q. Do you know, do you recollect where the yard limits are?

A. Yes sir.

3041 Q. Where are they?

A. Well, the west yard limit was out there by the street car crossing, out south of the well, there, and the east one is out here between 27th street and University Place.

3042 Q. And it is east of University Place, the east board.

388 They have boards up there?

A. They have.

3043 Q. And do the boards say anything?

A. They say, "yard limit".

3044 Q. Printed on boards, and they are put on posts on the side of the track?

A. Yes sir.

3045 Q. Now, what are they there for?

A. Well, they are there to let the engineers and trainmen coming into town know where the yard limits are.

3046 Q. What difference does it make whether they know where the yard limits are or not?

A. Well, when they pass one of them boards, they are supposed to be running under full control.

3047 Q. They are supposed to run under full control, what creates that supposition, Mr. McKinstry?

A. How is it?

3048 Q. What creates that supposition, are there any rules to that effect?

A. There is a book of rule got it in a time card.

3049 Q. The rules are on the time card and they are in these printed rules?

A. Yes sir.

3050 Q. That is where this supposition then, comes from?

Mr. Berge: The plaintiff objects as a speculation, the rules are the best evidence, and not cross examination, incompetent, and an opinion of the witness.

Overruled. The plaintiff excepts.

389 3051 Q. You mean to say then, Mr. McKinstry, there are rules they publish in book form such as this, (Indicating book) and upon time tables?

A. Yes sir.

3052 Q. And you say those rules provide that all trainmen shall conduct their trains different in the yard?

A. All enginemen, yes sir.

3053 Q. Conduct their trains different in the yard than they would out on the main line?

A. Yes sir.

3054 Q. Now, you have said Mr. Carr told you that there was a light engine in the yard?

A. He did.

3055 Q. Did you know anything about it other than what he told you?

A. I did not.

3056 Q. Did you know that it was going to stay in the yards or whether it was going out north or south?

A. I did not know.

3057 Q. Did not know anything about it?

A. No sir.

3058 Q. Well, knowing that that engine was in the yard, why did you go down into the yards towards Lincoln?

A. Well, went in there to do our work.

3059 Q. How?

A. Went in there to do our work.

3060 Q. Didn't you know that you might possibly meet that engine?

A. We did not know, that engine might have been sent out there, the engine might have broke down and might have turned around and been sent back.

3061 Q. Not knowing what that engine was going to do, just when- down there anyway?

A. Yes sir.

3062 Q. Why did you do that?

A. Well, we had a run to——

3063 Q. And where do you get that?

A. Get that right from the rules?

3064 Q. What did you- engine do in the yard limits?

A. Switching cars, lining them up and making them up.

3065 Q. And breaking them up?

A. Yes sir.

3066 Q. And sending cars to the various places of industry and etc.,?

A. Yes sir.

3067 Q. Then the switch engine as I understand it works most of the time right in the yard?

A. Yes sir.

3068 Q. And was allowed anywhere in the yard, there?

A. Yes, anywhere in the yard.

3069 Q. What rights does the switch engine have over other trains in the yards?

Mr. Berge: The plaintiff objects as not cross examination, incompetent irrelevant and immaterial, calling for an opinion and conclusion of the witness, not the best evidence, no foundation laid, the rules themselves are the best evidence.

Overruled. The plaintiff excepts.

A. Well, they have all the rights over everything but first class trains.

3070 Q. And is that a part of the rules?

A. Yes sir.

3071 Q. And you are familiar with those rules?

A. Yes sir.

3072 Q. Did you have a copy of this book of rules?

A. I did.

3073 Q. And were you furnished the time cards?

A. I was.

3074 Q. What was first class trains?

A. First class trains are passenger trains or trains given rights by train orders.

3075 Q. Then your engine, your crew, has to look out for first class trains?

A. Yes sir.

3076 Q. All other trains have to look out for you?

A. Yes sir.

3077 Q. That is the way. Now, when you came down into the cut where does the cut commence, south of 27th street, this way?

A. Oh, I don't know, right out there, I don't know it is about a quarter of a mile, I should judge.

3078 Q. So you mean to say that when you approach the cut coming from the east into Lincoln you came a quarter of a mile there at the rate of about ten miles an hour?

A. I beg pardon, I thought you meant the cut from where you entered to where we got hit, is about a quarter of a mile. No, it is about half a mile.

3079 Q. The cut commences about a quarter of a mile east of 27th street?

A. No, the cut commences about a half or three quarters of a mile west of 27th street.

3080 Q. I mean west. From half to three-quarters of a mile west and south of 27th?

A. Yes sir.

392 3081 Q. You approach that cut, you say, at the rate of about ten miles an hour?

A. Yes sir.

3082 Q. All of that time you could see down where the curve commences?

A. Yes sir.

3083 Q. Now, when you had gone that half miles or three quarters and you entered the cut, you slackened your speed?

A. We did.

3084 Q. Why did you do that?

A. He was slackening the speed to go around that cut.

3085 Q. So as to go around that cut under control?

A. Yes sir.

3086 Q. Slackening of the speed was to control the engine?

A. Yes sir.

3087 Q. And then at what rate of speed did you approach?

A. About three to five miles an hour.

3088 Q. Now, how long a distance did you go at the rate of speed at three to five miles an hour?

A. Well, until I got off before the collision.

3089 Q. Your engineer did not slacken any more?

A. No, I can't say that he did.

3090 Q. So that when he got into the cut, you were going, you want to be understood, at the rate of three to five miles an hour?

A. Yes sir.

3091 Q. And then you were looking out, and I understand it, from the rear footboard looking around on the east side?

A. Yes sir.

3092 Q. That would be on the inside of the curve?

A. Yes sir.

3093 Q. What were you looking out for?

393 A. Well, I was looking out for anything that happened to come around there.

3094 Q. Yes, looking out to see the track?

A. Yes sir.

3095 Q. And when you discovered the track obstructed, you gave the alarm?

A. I did.

3096 Q. And all of you dropped off?

A. Yes sir.

3097 Q. Now, you think the 1486 was north of the viaduct when you first saw it?

A. It was.

3098 Q. I think you said it was 35 or 50 feet north of the viaduct?

A. Somewheres along in there, I judge.

3099 Q. Yes, I don't suppose you know exactly?

A. No sir.

3100 Q. But you want to put it 35 or 50 feet north of the viaduct?

A. Yes sir.

3101 Q. And that would make your two engines at that moment about how far apart, 250 or 300 feet?

A. Somewhere along in there.

3102 Q. Then after you stepped off, Mr. McKinstry, how far did 1220 move away from you?

A. Well, between 75 and 100 feet, I should judge.

3103 Q. You mean that is counting the length of the engine, too?

A. Yes, from the back foot-board, I mean from where I got off to where I was standing on the engine.

3104 Q. You think that was 75 or 100 feet?

A. Yes, along there somewhere, I don't remember.

394 3105 Q. Now, at the time the engine struck, at what rate of speed was 1220 going, your engine?

A. I could not say what rate of speed it was going.

3106 Q. Haven't you any judgment at all about that?

A. Why, it was not exceeding over three miles per hour.

3107 Q. Isn't it a fact, Mr. McKinstry, that your engine 1220, had stopped?

A. Well, I could not say as it had stopped.

3108 Q. You could not say about that, you are not sure about that?

A. I am not sure about that, no sir.

3109 Q. Was the engine, 1486, stopped before it struck the switch engine?

A. I don't know, I don't think it did.

3110 Q. How?

A. I say, I don't know whether it did or not.

3111 Q. You heard them strike?

A. I heard them strike and seen them strike, I would not say whether one or the other had stopped.

3112 Q. Well, which engine was it th-t did the colliding, was it 1486 or was it 1220?

A. Well, I don't know whether they was both moving or just

one of them. I know that 1486 was running north and hit when they came together.

3113 Q. How long did it take 1486, or how long was it before the impact, the collision after you first saw that engine, 1486 coming?

A. I could not say.

— Q. Well, give us your best judgment?

A. Well, I could not say whether it was a minute or two minutes. I don't know.

395 A. I don't know.

3114 Q. Was it a minute?

A. I don't know, I could not say.

3115 Q. Was it two minutes?

A. I could not say as to that.

3116 Q. Now, when you first saw 1486, it was in motion, wasn't it?

A. It was.

3117 Q. What was its apparent speed, was it crawling along or was it coming at a pretty good rate of speed?

A. Well, I could not say, I did not figure that out.

3118 Q. Well, was the steam working on the engine, 1486?

A. The steam was working when I first seen it.

3119 Q. It was?

A. Yes sir.

3120 Q. Did he whistle?

A. I did not hear nobody whistle.

3121 Q. Did he ring a bell?

A. I did not hear no bell.

3122 Q. There wasn't any whistle for emergency brakes or anything of that kind after you saw it?

A. I did not hear any, no sir.

3123 Q. Now, when the engines came together, your engine, the switching engine went off on the east side with its pony trucks?

A. Yes, on the west side, on the outside of the curve on the west side or north side.

3124 Q. The west side, then, you mean the pony trucks went off on the west side. And the other engine, 1486, too of those pony trucks, two of the wheels went off on the east side?

A. No, on the west side.

3125 Q. They went on the west side, too?

A. Yes sir.

396 3126 Q. What damage did it do to these engines aside from putting the pony trucks off of the track?

A. I could not say, only they broke the pilot beams.

3127 Q. How?

A. Could not estimate the damage only broke the pilot beams and caved in the front end.

3128 Q. What is the pilot beam?

A. The beam that goes across in front of the engine where the draw-bars are fastened to.

3129 Q. What kind of a beam is that?

A. That is a wooden beam.

3130 Q. How long, is it as big as a railroad tie or larger?

A. Why, it is larger.

3131 Q. And it broke that?

A. Yes sir.

3132 Q. Broke it on two?

A. Yes sir.

3133 Q. That is, on your engine, wasn't it?

A. Yes, on both engines.

3134 Q. Broke this beam on both engines?

A. Yes sir.

3135 Q. And what kind of wood is that, oak?

A. Yes sir.

3136 Q. And then it caved in the end of the boiler, did it?

A. Yes the front end of the smoke box.

3137 Q. Yes, the smoke box, I mean. And that was so on both engines?

A. Yes sir.

3138 Q. Is all that happened to 1486?

A. Well, the tank was slid ahead on the frame.

3139 Q. I wish you would speak louder?

A. I say the tank was slid ahead on the frame.

3140 Q. How far had it been skidded ahead?

A. I don't know how far.

3141 Q. You mean when you say "skidded" ahead, it came through the engineer's cab on the engine?

A. Yes sir.

3142 Q. What distance would you say it skidded?

A. Well, I don't know.

3143 Q. Six inches or a foot, or a foot and a half or what?

A. About a foot.

3144 Q. Now, what did it have to do, Mr. McKinstry, in order to skid ahead?

A. Well, I don't know, it would have to break the braces off, I guess, the fasteners.

3145 Q. Had to break the fasteners?

A. Yes sir.

3146 Q. Do you know how many fasteners there — on both sides to fasten that tank?

A. I do not.

3147 Q. Isn't it true that there are pipe connections that also have a tendency to hold the tank in place?

A. Yes sir.

3148 Q. And those pipes had to be broken off?

A. Yes sir.

3149 Q. And it was the skidding ahead of the tank that fastened Mr. Wright in between his cab and the end of the tank, wasn't it?

A. It was.

3150 Q. He was standing up apparently ready to get out of his cab?

A. He was.

3151 Q. When the tank skidded and caught him?

398 A. Yes sir.

3152 Q. You were talking about seeing Hall, the engineer light on the ground, and also seen the fireman get out of your engine. Now when you first saw this engine coming, 1486 you say the fireman was up on this side of the car looking out of the side of the window with his head turned towards the south?

A. Yes sir.

3153 Q. How did they get out, did they get out of the window?

A. Out of the window.

3154 Q. They got out head first, didn't they?

A. I don't know how they got out, they got out.

3155 Q. Well, after they started out of the window, there wasn't anything to hang on to; they just had to go and fall on the ground?

A. Yes sir.

3156 Q. Did you see the fireman get off of 1486?

A. I did.

3157 Q. He would be on the west side, wouldn't he, opposite from you. When you stepped off, you did not fall down?

A. I did not.

3158 Q. All you had to do was just to step down?

A. Step off.

3159 Q. And lean backwards, and that is the way it was with all of them, wasn't it?

A. Yes sir.

3160 Q. But the fireman and the engineer, they went out of their windows with anticipation of their falling, that is the only way they could do it?

A. Yes, the only way they could do it.

399 3161 Q. You don't know what the speed of Mr. Wright's engine was when you first saw it?

A. I do not.

3162 Q. You don't know whether it was under control or not?

A. I do not.

3163 Q. What do you say about your engine, was it under control?

A. Well, I don't know whether it was or not, I could not say as to that.

3164 Q. That, is no part of your business?

A. No part of my business.

3165 Q. Your engine did stop within 75 or 100 feet of the time you first saw the engine, didn't it?

A. Yes sir.

3166 Q. You don't know, as I understand you what obstruction if any, there is, from the posts under the viaduct?

A. I do not, I never noticed.

3167 Q. Never had occasion to observe that?

A. No sir.

3168 Q. You don't know, you never rode in an engine?

A. I did not.

3169 Q. And you don't know whether the engineer going

around a curve can see farther than you can see on the foot-boards or not?

A. I do not.

3170 Q. You don't know but what he could see better than you could on the foot-board?

A. I could not say.

3171 Q. No, you could not say about that at all. When you got down after the collision, and you got down to your engine was the brake set?

A. I could not say, I did not examine.

400 3172 Q. Was the engine reversed?

A. I could not say, I did not get time to see.

3173 Q. You did not get time to see?

A. No sir.

3174 Q. Now, then, after the collision, you went on around—you did not take any time to do that did you, you started immediately after the impact?

A. Yes sir.

3175 Q. And you found Mr. Wright's engine about 35 or 40 feet away from the switch engine, didn't you?

A. Yes sir.

3176 Q. And it had gone back toward Lincoln?

A. Yes sir.

3177 Q. And it had gone back with two of those pony trucks off, two wheels off the pony trucks?

A. Yes sir.

3178 Q. Those pony trucks were running along the ties?

A. Yes sir.

3179 Q. And it had gone back 35 or 40 feet and then was coming back toward the other engine?

A. Yes sir.

3180 Q. Just as though it had not got enough the first time and wanted to try it over again?

A. Yes sir.

3181 Q. And you blocked it with a stick of wood?

A. No, I did not block it, I tried to block it, I tried to block the tank, so the tank would pull apart from the engine.

3182 Q. What did you try to block it with?

A. A Chunk of wood.

401 3183 Q. Well, wouldn't that do it?

A. It would not.

3184 Q. Did it run right over the wood?

A. No, it split the wood out from under it.

3185 Q. Skidded the wood out so it would not stop; how far did it go before it did stop?

A. I could not say.

3186 Q. Give us your best judgment?

A. I don't remember how far it did go, I was not paying any attention to that.

3187 Q. Did anybody then get up in the engine?

A. There was a barkman up in the engine?

3188 Q. Do you know what barkeman that was?

A. Mr. Hinitt.

3189 Q. He belonged to that engine, did he?

A. Yes sir.

3190 Q. Do you know what he was doing up there?

A. He got up there to stop the engine.

3191 Q. Stop the engine?

A. Yes sir.

3192 Q. What do you mean by that, to put on the reverse lever or cut off the steam?

A. Well, he got up there to stop it, shut off steam and stop it.

3193 Q. Yes, and he did that, and that is what stopped the engine, finally?

A. It is.

3194 Q. When you got up to 1486, you could see Mr. Hinitt, up there could you?

A. No, I could not.

402 3195 Q. Well, you did see him, finally?

A. Yes sir.

3196 Q. And you saw what he was doing?

A. Yes sir.

3197 Q. And he set the brakes did he?

A. I could not say what he done, he stopped the engine.

3198 Q. Didn't you see the brakes set?

A. I did not see the brakes set, no sir.

3199 Q. You could not say whether the brakes were set or not?

A. I could not say, I did not pay no attention.

3200 Q. Are you able to tell the jury just what act Mr. Hinitt did to stop 1486?

A. He told me what he done.

3201 Q. What?

A. He told me what he done.

3202 Q. Right there at that accident?

A. No, not right there.

3203 Q. When?

A. Well, after that when we was down in the yards.

3204 Q. How long after?

A. A couple or three hours afterwards.

3205 Q. What did he say?

Mr. Berge: The plaintiff objects as not cross examination, hearsay, incompetent.

Question withdrawn.

3206 Q. Where were you when this was being talked about, right at the wreck?

A. At the passenger depot.

403 3207 Q. In the passenger depot, you had gone down to the passenger depot, you and Mr. Hinitt was talking about the wreck?

Mr. Berge: The plaintiff objects.

3208 Q. Now, then, you may state just what Mr. Hinitt said to you about what he did to that engine, 1486?

Mr. Berge: The plaintiff objects as not cross examination, incompetent, hearsay.

Sustained. The defendant excepts.

3209 Q. You don't know what either one of those engines weighed?

A. I do not.

3210 Q. But you do know that Mr. Wright's engine was a heavy one?

A. It was.

3211 Q. After it was discovered, Mr. McKinstry, that Mr. Wright was fastened in there, you and all other members of the crew did all in your power to extricate him, didn't you?

A. We did.

3212 Q. And the first thing you did after you saw he was fastened, was to run and telephone for the doctor?

A. It was.

3213 Q. And the ambulance?

A. Yes sir.

3214 Q. And then after that you ran to see if you could not get some jacks to separate the tank and the cab, didn't you, or someone did?

A. Yes sir.

3215 Q. And after you got the jacks, you think it was 35 to 50 minutes that he was kept there?

A. Yes sir.

3216 Q. You did not have any jacks or chains or tools of any kind particularly on your switch engine?

A. No sir.

404 3217 Q. Do you ever have?

A. No sir.

3218 Q. You don't carry them?

Mr. Berge: Let him answer.

3219 Q. You never do carry those, do you?

A. No sir.

3220 Q. And there wasn't any on Mr. Wright's engine?

A. No sir.

3221 Q. You say there wasn't any water running on Mr. Wright?

A. There was not.

3222 Q. Mr. Wright did not talk to you?

A. He did not.

3223 Q. What kind of a looking man was Mr. Wright?

A. Well, he was a medium sized man, a pretty good heavy, a heavy set man, had a black mustache.

3224 Q. Short or tall?

A. Medium sized.

3225 Q. How much would you say he would weigh?

A. Well, I could not say.

3226 Q. Well, give us your judgment, Mr. McKinstry?

A. Might have weighed 175 or 200 pounds, I guess.

3227 Q. How much?

A. 175 or 200 pounds.

3228 Q. You saw the actual collision, you said, between the two engines?

A. I did.

3229 Q. I will ask you, if your engine was moving faster at the time they struck?

Mr. Berge: The plaintiff objects as calling for an opinion  
405 and conclusion of the witness, not a statement of facts, already gone into and incompetent.

3230 Q. —.

A. Well, 1486 seemed to be going the fastest, I don't know whether it was or not.

3231 Q. It seemed to be going considerably faster, didn't it?

Mr. Berge: The plaintiff objects as not cross examination, and incompetent, calling for an opinion and conclusion of the witness, already answered, and not a statement of any fact.

Overruled. The plaintiff excepts.

A. Why, it did seem to be going faster, yes. I don't know whether it was going considerable or not.

3232 Q. But you will say and want the jury to understand you think 1486 was going faster than your engine was?

Mr. Berge: The plaintiff objects as calling for an opinion and conclusion of the witness, not cross examination, and incompetent.

Overruled. The plaintiff excepts.

A. Yes sir.

3233 Q. During the seven years Mr. McKinstry, that you have been in the employment of the Rock Island railroad your business has always been in the yards, the Lincoln yards?

A. Four years of it has.

3234 Q. Prior to that time you were engaged in other lines of work?

A. Yes sir.

3235 Q. The four years you have spent right here in the Lincoln yards?

A. I have.

3236 Q. As a switchman?

406 A. Yes sir.

3237 Q. And accompanied each day the switch engine?

A. Each day I worked.

3238 Q. What?

A. Yes, accompanied it each day I worked.

3239 Q. Well, I mean of course each day you worked you was with the switch engine?

A. Yes sir.

3240 Q. And the yard limits have been where they are now for four years?

A. Yes, along about there, I don't know whether the same or not.

3241 Q. How is that?

A. They have been along about that place, I don't know whether they have changed any or not, I have not heard about any change.

3242 Q. Been along or about the same place for the four years that you have worked in the yards?

A. Yes sir.

Redirect examination.

Examined by Mr. Berge for the plaintiff:

3243 Q. You say you think Mr. Wright's engine was running faster than yours?

A. I think it was, yes sir.

3244 Q. But when you first saw him, he was, did you saw, 50 feet north of the viaduct, about?

407 Mr. Holmes: The defendant objects as not re-direct examination.

3245 Q. Did you say that before, 50 feet north of the viaduct, you saw him?

Mr. Holmes: The defendant objects; he said that twice.

3246 Q. And the collision took place about opposite the barn?

Mr. Holmes: The defendant objects as having been already gone over and as not re-direct examination.

Overruled. The defendant excepts.

A. Yes sir.

3247 Q. And you could see the top of the viaduct when you first saw Mr. Wright, 300 or 400 feet away?

A. I could.

3248 Q. I see. You described to Judge Holmes what kind of a looking man Mr. Wright was.

(Picture identified as Exhibit "19.")

3249 Q. I hand you Exhibit "19" and ask you to examine it and state whether that is the man?

A. It is.

3250 Q. How?

A. It looks like him, yes sir.

3251 Q. Well, you say it is?

A. Yes sir.

Mr. Berge: The plaintiff offers in evidence exhibit "19."

Cross-examination as to competency.

408 Examined by Mr. Holmes.

3252 Q. Do you recognize this as a picture of Mr. Wright?

A. Why it looks similar to him, yes, or his brother.

3253 Q. You had seen a man similar to him passing through the yards a great deal, had you?

A. Yes sir.

Exhibit "19" picture received in evidence without objections, attached hereto at the end of the bill of exceptions and made a part hereof.

Redirect examination.

Berge\*

Examination resumed by Mr. Holmes for plaintiff.

3254 Q. You said something on cross-examination about the rights of a switch engine. The four years you have been in the yard on all of the regular trains you would give them the main line, wouldn't you, and let them pass you?

Mr. Holmes: The defendant objects as immaterial and not proper re-direct examination.

Overruled. The defendant excepts.

A. No.

3255 Q. What would you do?

A. If we had work on the main line we stayed there until it was done.

3256 Q. Stay there until you were done?

A. Yes sir.

3257 Q. And block the regular trains on the main line, the regular freight trains?

A. Hold them there until we could get out of the way or else let them run around us.

3258 Q. How?

A. Hold them there until we got out of the way or let them run around us.

3259 Q. Well, would you run under control?

A. We would.

3260 Q. Well, other trains, you say had to look out for themselves, but you were to run under control, of course?

A. Yes sir.

3261 Q. How is that?

A. Yes sir.

3262 Q. Especially around this curve?

A. Well, any place.

3263 Q. Any place under control,—is that one rule?

A. It ain't exactly a rule but that is what we understand when we get employed?

3264 Q. You do what?

A. We understand that when we get employed.

3265 Q. Understand what?

A. That we ain't to tear around or break up things.

3266 Q. Do what?

A. Supposed to run under control in the yards.

3267 Q. Yes, that is the rule that you understand when you get employed?

A. Yes sir.

3268 Q. How?

A. Yes sir.

3269 Q. But, you don't know what "under control" is?

A. I do.

410 3270 Q. You think that your engine was running three miles an hour when she collided?

A. I do, somewheres along there.

3271 Q. Didn't you have a custom of riding on the front foot-board around that cut?

A. No sir.

3272 Q. You could see farther on the front foot-board, than on the hind foot-board, couldn't you?

A. I don't know.

Mr. Holmes: The defendant objects to this examination as having been all over.

Court: He has already answered it.

3273 Q. After you got the jacks it took you only a few minutes to get Mr. Wright out, didn't it?

A. No, it takes quite a while.

3274 Q. How?

A. It took us quite a while.

3275 Q. Took you quite a while to get the jacks, didn't it?

A. I don't know how long it took us.

3276 Q. Where did you get the jacks from?

A. Right down in the yards there.

3277 Q. Where?

A. At Vine street.

3278 Q. Rock Island jacks?

A. Yes sir.

3279 Q. How far from the accident, from the collision?

A. Well, it is about half a mile, I guess.

3280 Q. Who got them?

A. Well, the car-repairers came out there with them.

3281 Q. Did they go afoot?

411 A. No sir.

3282 Q. How did they go?

A. On the hand car.

3283 Q. How did the hand car men know about this collision?

A. Well, foreman Carr, ran down there and told them.

3284 Q. Well, he walked down?

A. Well, I did not say he walked, he started out on the run.

3285 Q. He did not go on a car, did he?

A. He did not.

3286 Q. Well, it took all that time to get the jack there, didn't it?

A. It did.

3287 Q. How long do you say before the jacks came after the collision?

A. I could not say.

3288 Q. How long did you say it took you to get him out after you had the jacks?

A. I could not say.

Recross-examination.

Examined by Mr. Holmes for the defendant:

3289 Q. Now, Mr. McKinstry, just one more point, I understood you to testify this morning that when you stepped off your engine your engine was going at the rate of from 3 to 5 miles an hour?

A. It was.

3290 Q. What did you say?

412 A. I say it was.

3291 Q. Then, you also testified, if I remember, that when the engines collided, you would not say how fast your engine was going?

A. I would not.

3292 Q. So you don't want to be understood as saying that at the time of the collision your engine was going 3 miles an hour?

A. I would not.

Redirect examination.

Examined by Mr. Berge for the plaintiff:

3293 Q. Didn't you say your engine was going 3 miles an hour at the time of the collision?

A. At the time I got off.

3294 Q. Didn't you swear it was going 3 miles an hour at the time of the collision?

A. I did not.

3295 Q. Have you talked with Judge Holmes or Mr. DeLacey since last Saturday?

A. I have not.

3296 Q. Since this case began?

A. No sir.

3297 Q. When did you?

A. I never did.

3298 Q. You never did?

A. No sir.

413 Recross-examination.

Examined by Mr. Holmes for the defendant:

3299 Q. I want you, Mr. McKinstry, to take this picture, exhibit "8", and get it before the jury and point out there, where you say that collision occurred so that they can see just the point you put it.

A. (Witness indicated on the picture exhibit "8")

3300 Q. When you say the switch engine runs in the yard

"under control", do you mean that it always runs at the same rate of speed?

A. I do not.

3301 Q. Now, upon frequent occasions you have to do what is called "kicking out", some cars, and when you kick out cars your switch engine runs considerably faster, doesn't it?

A. It does.

3302 Q. And you go at a pretty good rate of speed?

A. We do.

3303 Q. And when you make the coal chutes, you get a pretty good running start before you get up there?

A. Yes sir.

3304 Q. And what you mean running under control, is that you can shut down your engine and stop it within the distance of your vision? What you mean is, that in running under control that you can shut down your engine, stop it within your vision to avoid any obstruction on the track?

A. Yes sir.

3305 Q. The switch engine as you say, by the rules, and as you understand the rules, has a right over regular freight trains,  
414 *over regular freight trains* and over all second class trains and extras?

Mr. Berge: The plaintiff objects as not proper cross examination. Sustained.

The plaintiff excepts.

Witness excused.

415 LEONARD W. YOUNG, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for the plaintiff:

3306 Q. What is your full name?

A. Leonard W. Young.

3307 Q. And where do you live, Mr. Young?

A. Now, at 1327 "O".

3308 Q. Where did you live December 8th, 1909?

A. 1814 Holdrege street.

3309 Q. Where is that with reference to the Holdrege street viaduct?

A. Three doors east.

3310 Q. On which side?

A. East side.

3311 Q. North or south of the viaduct?

A. On the north.

3312 Q. On the north or south of Holdrege street?

A. Yes sir.

3313 Q. Does Holdrege street run east and west?

A. Yes sir.

3314 Q. Were you at home that afternoon?

A. Yes sir.

3315 Q. Did you see this collision?

A. I did not.

3316 Q. How long after the collision, about, did you get there?

A. Just as soon as the men called with the ambulance.

3317 Q. Well, where did the men call with the ambulance?

A. At Rudy Hahn's place.

3318 Q. Where is Rudy Hahn's place?

A. 1812 Holdrege.

416 3319 Q. Would you say from your house?

A. The first door to the west.

3320 Q. And are there any other houses west of Hahn's house?

A. Yes sir.

3321 Q. How many?

A. One.

3322 Q. There is one and then the Hahn house and then yours?

A. Yes sir.

3323 Q. You are the third house on the north side of the street facing south?

A. Yes sir.

3324 Q. Now you say the man called at Rudolph Hahn's house?

A. Yes sir.

3325 Q. You were over there?

A. I was.

3326 Q. Tell the jury, at the time of the collision whether you were on the second lot east from the track?

A. How is that?

3327 Q. Were you on the second lot east of the Rock Island track when the collision took place?

A. I was.

3328 Q. In going over there, tell the jury which way you went?

A. Went straight to the viaduct and then down off of the side on the east side of the embankment.

3329 Q. That is, you ran from Holdrege street the front end of the house, went west?

A. Yes sir.

3330 Q. And then passed down on the north side of the viaduct?

A. Yes sir.

417 3331 Q. Do you know where the barn is on the east side of the track and north of the Holdrege street viaduct, on that first lot there?

A. Well, I pretty near know where it is, yes, I ain't very much acquainted right in there, but I know just about where it is.

3332 Q. I will hand you exhibit "8" and ask you to state whether those are the buildings looking north?

A. Them is the buildings.

3333 Q. Tell the jury just where that collision took place, I wish you would locate it to the jury and then go over to the jury and point it out?

A. Here it is about here. (Indicating.)

3334 Q. Put a little cross there, mark it clear across, so it reaches up on the light, straight up?

A. (Witness indicates on the picture.)

3335 Q. I wish you would go over to the jury and point it out to them?

(By a juror:)

3336 Q. Does that cross represent where it was, or the long mark?

A. The long mark.

3337 Q. Does the long mark that you have marked there, that represent it?

A. Yes sir, that is just about where I think the wreck was.

3338 Q. And did you go over immediately after somebody called at the Hahns for the ambulance?

A. I did.

3339 Q. Go right down there?

A. I did.

3340 Q. And were you there continually until Mr. Wright was taken out?

418 A. I was.

3341 Q. Did you see Mr. Wright taken away?

A. I did. I helped take him away.

3342 Q. And how long a time do you think it was from the time you went down there until the- took him away?

A. Well, it was close to an hour, I think, some place along there, I could not say for sure, but it was some place along there, two or three minutes something like that.

3343 Q. Were you there when they came with the jacks?

A. Yes, I was.

3344 Q. After the- came with the jacks, tell the jury what your judgment is as to the time it took before they got him out?

A. Well, they was-'t very long getting the man out after the jacks were there.

3345 Q. About how long?

A. I should judge about ten or fifteen minutes, something like that, I think.

3346 Q. And tell the jury how it was done?

A. It was done just about as simple as this other gentleman testified, that the tank was jacked apart from the top to the bottom.

3347 Q. You jacked above and below?

A. Yes, and the cab also was broken, and the hand hold on the front tank, when you go to enter the tank on the left side, that was broke off so as to allow Mr. Wright's shoulder to slip by.

3348 Q. Did you hear him talk?

A. He said very few words.

3349 Q. Was there any water running on him?

419 A. The tank where the valve goes in the tank was broke loose and there was some running over his foot, I think, I would not say for sure, it has been so long ago, I don't remember.

3350 Q. Cold water, or hot water?

A. Why, it was in the tank, it was cold.

3351 Q. Could you hear the collision where you were over there?

A. No, we could not.

3352 Q. You don't remember hearing it?

A. I don't remember hearing it.

3353 Q. When you got there, Mr. Young, were the engines together?

A. They were not.

3354 Q. Well, if they were not together how were they?

A. Why, they were apart, about, some distance I should judge, 15 or 20 feet, I think; they was not much over that if they was.

3355 Q. On which side of the engine was Mr. Wright pinned into the engine?

A. Pinned into the engine.

3356 Q. On which side of his engine, the east side or west side?

A. He was on the west side, the fireman's side.

3357 Q. The fireman's side?

A. Yes sir.

3358 Q. And which way was he facing?

A. Facing west.

3359 Q. And where was he caught?

A. He was caught right here (indicating), and the rod on the tank held his shoulders.

3360 Q. Do you know whether his feet or legs was caught?

A. No, I don't think his feet was caught at all.

3361 Q. After he was taken out, the talking you heard,—  
420 was that after or before?

A. Well, while he was in there and carrying him over to the automobile.

3362 Q. Now, you say the engines were 15 or 20 feet apart, tell the jury whether they were on the track or not?

A. They were not on the track when I got down there.

3363 Q. How where they?

A. Why, the pony wheels was off on both engines, as near as I can remember, the pony wheels is the front pair or wheels.

3364 Q. And did you observe the track around there at that time, the ties?

A. Why, no, I paid no attention to the ties at all.

3365 Q. Have you ever since that time?

A. I never have; I moved from there a little after that.

3366 Q. How?

A. I moved from there a little after that, I paid no attention to the ties.

3367 Q. Now, when you put a mark here, exhibit "8," you say that is the place where the collision took place, as near as you can remember?

A. Yes, as near as I can remember.

3368 Q. If the engines were 15 or 20 feet apart how would you locate the place?

A. Well, I don't know exactly how you want—

3369 Q. Well, which engine did you give there?

A. Mr. Wright's engine.

3370 Q. You think the pony trucks from both engines were off, clear off, all four wheels?

421 A. No, I don't think they was, the first pair, I did not pay much attention, I think the first pair of Wright's; I did not pay much attention to the switch engine, but Wright's engine.

3371 Q. When you got there, was the engines standing still?

A. They were.

3372 Q. Both of them?

A. They were.

3373 Q. Did you observe the damage or injury done to the engines?

A. I did not pay much attention. Things was broke up a little on the smoke box and pilot.

3374 Q. What time of the day do you think it was?

A. Well, it was in the afternoon, I don't know something along about 3 o'clock, some place along there, I could not recall the minute or the hour.

3375 Q. You say you helped take him away, were you there when they removed him?

A. No I were not.

3376 Q. Did you ever see Mr. Wright after that?

A. I never did.

3377 Q. Of course he could not walk, he was paralyzed?

A. No.

3378 Q. Had to be carried?

A. Had to be carried.

3379 Q. Where did they carry him

A. 25 or 30 feet below the viaduct and put him in the automobile.

3380 Q. Yes, under there, the viaduct and over to the right side?

A. Yes sir.

3381 Q. In the automobile?

A. Yes sir.

422 3382 Q. Was he laying down or sitting up?

A. Kind of half way sitting down, and two men back in the seat with him and held him.

3383 Q. The automobile went away and you did not see him?

A. Yes, I seen Mr. Wright.

3384 Q. You helped carry him over?

A. I helped carry him over and put him in the automobile.

#### Cross-examination.

Examined by Mr. Holmes for the defendent:

3385 Q. It seemed like an awful long time to you after you got over there before they got him out, didn't it?

A. How is that?

3386 Q. It seemed a long time before they got him out after you got there?

A. Well, the circumstances was they had nothing to get him out with, until they got something there to get him out.

3387 Q. It seemed like a long time?

A. Well, it did to me, being it was pretty cold.

3388 Q. It was pretty cold?

A. Yes sir.

3389 Q. Did you notice how Mr. Wright was fastened there?

A. He seemed to be fastened, caught right through there. Indicating.)

3390 Q. What caught him?

A. The tank and the cab, the cab had slid on the frame.

3391 Q. Did you notice that tank slid on the frame?

423 A. No, but any eyes could show a man it had slipped, I did not pay much attention to the tank that had slipped.

3392 Q. You could see that it caught him, otherwise the tank was the only thing that could have caught him, the cab could not have slipped,—you say that the tank had slipped?

A. I seen that the tank was up again him.

3393 Q. And that it slipped on its foundation?

A. I paid not much attention to that.

3394 Q. Could you tell how far it had come?

A. I could not, I just seen the man was caught in there and was caught pretty bad.

3395 Q. It was the tank and the cab and he was fastened?

A. Fastened right in there, between there.

3396 Q. How much space do you think was left between the tank and the cab?

A. After they had taken the man out?

3397 Q. Yes?

A. I paid no attention.

3398 Q. Before they took him out?

A. Before they took him out?

3399 Q. Yes?

A. Well,—

3400 Q. A foot and a half or two feet or three feet or what was it?

A. No, no, I don't think there was much more, than 14 inches, I don't think at the best.

3401 Q. And it was in that slight space of 14 inches that it caught Mr. Wright thro-gh here (Indiacting)?

A. That it caught him in through here (Indicating).

Witness excused.

424 Mr. Berge: I read Section "1," Chapter "101" of the Ordinances of the city of Lincoln, 1908, page "266," and also Section "2." I offer these two sections, let the record show they are offered without any objections.

Section "1." "Trains, rate of, in city." "No train, engine, car, or trucks shall be run over any railroad within the corporate limits of the city of Lincoln at a greater rate of speed than four miles an hour."

Section "2." "Bell on engines. There shall be a bell of at least 30 pounds attached to every engine which shall be continuously

rung by the engineer or fireman in each engine while passing over any railroad within corporate limits of said city."

Mr. Berge: I offer in evidence deposition of E. E. McLane.

Read to the jury by Mr. Berge.

It now being 12 o'clock M. an adjournment was taken until 2 o'clock P. M. same day, March 20th, 1911.

425 2 o'clock p. m., March 20th, 1911.

Court met pursuant to adjournment and the following proceedings were had and done.

Deposition of E. E. McLane received in evidence and copy of which herewith follows.

426 THE STATE OF NEBRASKA,  
*Lancaster County, ss:*

In the District Court of the Third Judicial District of Nebraska  
in and for Lancaster County.

LIZZIE L. WRIGHT et al., Administrators of the Estate of Otto O.  
Wright, Deceased, Plaintiff.

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corpora-  
tion, Defendant.

*Notice to Take Depositions.*

The above named defendant — — — will take notice that on Wednesday the 15th day of February, 1911 the said plaintiffs — — —, — — —, will take the depositions of G. W. Hall, D. F. Goines, B. E. McLane, L. H. Hinitt and J. A. Cuykendall, sundry witnesses, to be used as evidence on the trial of the above entitled cause, at office of C. H. Denney, First National Bank Bldg., in the City of Fairbury, county of Jefferson and State of Nebraska between the hours of nine a. m. and five p. m. of said day, and the taking of said Depositions will be adjourned from day to day, between the same hours, until they are completed.

G. W. BERGE,  
*Att'y for Plaintiffs.*

Received copy of the above notice this 10th day of February, A.  
D., 1911.

E. P. HOLMES &  
G. D. DE LACY,  
*Att'y for Defendant.*

427 Depositions of sundry witness- taken before me, C. H. Denney, a Notary Public, within and for the County of Jefferson, in the State of Nebraska, on the 15th day of February, in the year 1911, between the hours of Nine a. m. and five p. m., of said

day, at my office in the First National Bank Building in the City of Fairbury, in said County and State, pursuant to the annexed notice, and the stipulation hereinafter set forth, in an action pending in the District Court, of the Third Judicial District of Nebraska, in and for Lancaster County, in which Lizzie L. Wright, et al., Administrators of the estate of Otto O. Wright, deceased, are plaintiffs, and the Chicago, Rock Island and Pacific Railway Company, a Corporation, is defendant:

It is stipulated and agreed between Counsel for the defendant, and Counsel for plaintiff, that the testimony of the witness- G. W. Hall, D. F. Goines, E. E. McLane and L. H. Hinitt, and J. A. Cuykendall, may be taken down in short hand by Bertha Schultz, and reduced to typewriting in the absence of the witness.

George W. Berge appeared for plaintiff, and E. P. Holmes, and G. D. DeLacy, Att'ys, appeared for Defendant.

E. E. McLane of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

428 E. E. McLANE.

Direct examination by G. W. Berge:

3402 Q. You may state your name?

A. McLane, E. E. McLane.

3403 Q. B. E.?

A. E. E.

3404 Q. Mr. McLane, where do you live?

A. Fairbury, 209 Sixth Street.

3405 Q. And how long have you lived here, about?

A. About fourteen years, I think.

3406 Q. Continuously?

A. Yes.

3407 Q. Been your home?

A. Yes.

3408 Q. And what is your occupation at the present time?

A. Fireman on the Rock Island.

3409 Q. Fireman on the Rock Island, on a local switch engine or run on the road?

A. Run on the road.

3410 Q. Freight train or passenger?

A. Freight train.

3411 Q. Where do you run?

A. From here to Horton?

3412 Q. Horton, Kansas?

A. Yes sir.

3413 Q. And how long have you been a fireman for the defendant railroad?

A. A little bit over three years.

3414 Q. And what was the nature of your employment for the defendant before that time?

429 A. Common laborer.

3415 Q. But you have been continuously a fireman for three years?

Q. No not continuously, I was off for a matter of a year.

3416 Q. When you were off, were you in the employ of the road?

A. No, I was not in the employ of the road then.

3417 Q. You wasn't?

A. No.

3418 Q. Does that cover a period of three years or more that you were firing?

A. Just three years I fired all together.

3419 Q. Freight train all the time?

A. Most all the time, occasionally on Passenger?

3420 Q. Did you know Otto O. Wright in his life time?

A. Yes sir.

3421 Q. And how long had you known him?

A. Just two days before he got killed.

3422 Q. And at that time, what was your business?

A. Fireman, working as fireman.

3423 Q. For the Rock Island?

A. Yes sir.

3424 Q. And at that time where were you living?

A. Fairbury.

3425 Q. And at that time did you have regular runs on any Engine?

A. No sir.

3426 Q. State the nature of your employment at that time, the nature of your work.

A. Why I was extra fireman then, whenever regular men lay off, or there was occasion they could use an extra man, why I was called to fill the place.

430 3427 Q. You remember the date that Mr. Wright was killed?

A. Yes sir.

3428 Q. State your best recollection as to when it was.

A. The 8th of December, about 2:30 in the afternoon.

3429 Q. Was it eight or ninth?

A. In the afternoon.

3430 Q. On the 8th or 9th?

A. I think it was the 8th.

3431 Q. In what year?

A. 1910.

3432 Q. Where was it that he was killed?

A. At Holdredge Street, Lincoln, I think it was about one hundred feet east of the overhead bridge at Lincoln.

3433 Q. Which way was his train going?

A. East to Council Bluffs.

3434 Q. Where did you get on to that engine to fire?

A. Fairbury.

3435 Q. Where did he get on so far as you know?

A. Fairbury.

Judge Holmes asked: "Where did you say?" and Witness answered "Fairbury."

3436 Q. You may state whether the engine started here or whether it come from the south or west, if you know.

A. Why it started from here with us, yes.

3437 Q. Your recollection is that Mr. Wright started here with you?

A. Yes sir.

3438 Q. What was his occupation that day?

A. Engineer on this engine.

3439 Q. State what kind of a train that was that day that you and Mr. Wright was on.

A. We had no train, whatever, just a lone engine.

3440 Q. Do you remember now the number of the engine?

A. Yes sir.

3441 Q. What was the number?

A. 1486.

3442 Q. 1486?

431 A. Yes sir.

3443 Q. You stated a while ago, you had known Mr. Wright two days before that?

A. Yes sir.

3444 Q. Were you firing for him during the two days?

A. Yes sir.

3445 Q. Where?

A. On the west end, made a trip going west out of here and return.

3446 Q. When you say the west end, what do you mean?

A. It means, the western part of our division out here; It is always referred to here as east end, and west of here is west end.

3447 Q. And how many runs had you made with him west before this day?

A. Just the one.

3448 Q. Where did you run to?

A. From here to Phillipsburg and return.

3449 Q. Phillipsburg, Kansas?

A. Yes sir and return.

3450 Q. You may state, as fireman, whether you knew, and ordinarily whether you do know as fireman, the running orders of a train or Engine?

Judge Holmes objected to telling the contents of Orders.

A. Well I don't remember.

3451 Q. I am not asking what it was this particular time, but generally are you acquainted with the orders the Engineer has?

A. Yes, I always read them.

3452 Q. You say you do always read them?

A. Yes.

3453 Q. Is that required of you?

A. It is required.

3454 Q. It is a ruling of the Company?

A. Yes sir.

3455 Q. And what do you say was your destination that day, going east, you and Mr. Wright?

A. Destination, where we were going to?

3456 Q. Yes sir.

A. Phillipsburg,—or Council Bluffs, Iowa.

3457 Q. You said Phillipsburg, do you mean that?

A. No, Council Bluffs, Iowa.

3458 Q. I mean the day that he was killed, state where you started and where you were going?

A. We started from here to take Engine 1486 to Council Bluffs, Iowa.

3459 Q. You may state who else was with you on the Engine, besides Mr. Wright.

A. Mr. Hinitt.

3460 Q. That is L. H. Hinitt?

A. Yes sir.

3461 Q. Anybody else?

A. No sir.

3462 Q. Where did he live at that time?

A. Fairbury, I think.

3463 Q. Do you remember when you left Fairbury on that day, what time in the day it was?

A. I don't remember what time it was.

3464 Q. Well, don't you remember about the time?

A. No, I couldn't say exactly about what time it was.

3465 Q. Did you know when you left Fairbury, where you were going?

A. Yes, we knew where we were going.

3466 Q. You knew that yourself?

A. Yes.

3467 Q. State if you know, where you were going.

A. We were called to take this Engine to Council Bluffs, Iowa.

3468 Q. Had you read the orders?

A. I don't know whether I had or not.

3469 Q. The rules required it.

A. Yes, the rules required it.

3470 Q. Did you know where you were going when you started, you, yourself as fireman?

A. Yes, I knew where we were going.

3471 Q. And where did you get that information?

A. The Round House caller.

3472 Q. Did you get it from the order, that you call an order?

A. No, he just called us for an Extra east.

3473 Q. I understood you to say that orders, the rules required the firemen to read them?

A. They do.

3474 Q. What do you mean by orders, train dispatcher's orders?

A. Yes sir.

3475 Q. Well, if the rules require you to read this order, you probably read it?

A. I probably did, I don't recollect now whether I read it or not, but I always do I know.

3476 Q. Well, whatever your recollections may be about that, state whether you knew when you started, where you were going with that Engine.

A. Yes, I knew we were going to Council Bluffs.

3477 Q. Do you know what the orders were as to where you should stop from here to Council Bluffs?

A. I don't remember as to that.

434 3478 Q. Do you remember when you got to Lincoln?

A. Yes sir.

3479 Q. Do you remember what time it was?

A. I don't remember what time it was.

3480 Q. State whether you stopped between here and Lincoln, if you know?

A. Only one place I remember of stopping.

3481 Q. Where?

A. At Jansen, first station out of here.

3482 Q. And you didn't stop again until you struck Lincoln.

A. I don't remember that, whether we did or not.

3483 Q. State whether you stopped in Lincoln at the depot.

A. Yes, we stopped there.

3484 Q. What was Mr. Hinitt's place on the Engine, what was he?

A. Flagman.

3485 Q. He was flagman?

A. Yes sir.

3486 Q. And where was the flagman accustomed to ride?

A. He was riding in the Engine, about the only place he could ride.

3487 Q. Had this flagman accompanied the Engine from Fairbury up till the time of the accident?

A. Yes sir.

3488 Q. He was riding in the Engine?

A. Yes sir.

3489 Q. You can't tell just where, no regular place?

A. No, I can't tell where he was all the time, most of the time on my seat.

3490 Q. On which side of the Engine does the fireman ride?

A. Left side.

3491 Q. And where does the Engineer ride?

A. On the right side.

435 3492 Q. Then in going north, the Engineer was on which side, east or west side, which side was the Engineer Mr. Wright on?

A. East side.

3493 Q. And which side were you on?

A. The north side, or the west side.

3494 Q. I wish you would state whether this Engine was a large engine or small Engine.

A. It was a pretty large engine.

3495 Q. Well, state whether it was a freight Engine?

A. It was a freight engine.

3496 Q. How was it constructed on the inside with reference to where the Engineer and Fireman was, was it an open room in there or did he have to climb up on the side, the Engineer and fireman the same way?

A. Why he had to step up over the deck to get over on the side.

3497 Q. Well there are some Engines constructed so the deck is open, and some constructed where you get up in the side, no place only where you sit. Describe how the engine was? (Attorney indicating).

A. You had to step up to get on your seat up out of the deck.

3498 Q. And in stepping out of the deck, would you step forward or sideways? Would you step forward any?

A. Not much.

3499 Q. Did you carry a watch that day?

A. No sir.

3500 Q. Sure about that?

A. Yes.

3501 Q. Now what time about did you say that Mr. Wright was killed?

A. Two-Thirty, as near as I can remember.

3502 Q. What makes you think that, if you had no watch?

A. Well I heard some other fellows say it was 2:30.

436 3503 Q. You heard other fellows say it was 2:30?

A. Yes sir.

3504 Q. Had, you, yourself, ever run north of Lincoln, over this road and under this Holdrege street viaduct?

A. Yes, I have been out there before.

3505 Q. About how many times?

A. Well, I wouldn't say to that how many times.

3506 Q. Could you give us an idea?

A. No, I have been under there before though.

3507 Q. As fireman?

A. Yes sir.

3508 Q. You never run that way with Mr. Wright?

A. No sir.

3509 Q. Now the Rock Island road in crossing under this viaduct, runs which way, what direction with the compass, if you know?

A. Well now you couldn't prove that by me, I am all turned around in Lincoln.

3510 Q. You are?

A. Yes sir.

3511 Q. Well, state whether the train runs straight at right angles under through the viaduct or whether it goes in a slanting fashion?

A. There is a very sharp curve where overhead bridge is.

3512 Q. And, which way is the curve, swinging to the right or left, going north?

A. Swings to the right.

3513 Q. You say there is a sharp curve there to the right?

A. Yes sir.

3514 Q. To the right?

A. Yes sir.

437 3515 Q. And how far is this Holdrege street viaduct from the depot of the Rock Island in Lincoln, about?

A. Maybe a half a mile about.

3516 Q. You wouldn't be certain about that either way now?

A. No.

3517 Q. What did your engine run into there that day?

A. Run into a switch engine.

3518 Q. Do you know the number of that engine?

A. Yes sir.

3519 Q. What was it?

A. 1220.

3520 Q. You may state whether you saw that switch engine numbered 1220 before you jumped off?

A. No sir.

3521 Q. How did you come to jump off?

A. Well I heard the air go into the emergency and seen the brakeman going.

3522 Q. Do you mean the flagman?

A. Yes.

3523 Q. Was he a brakeman too?

A. Yes he was employed as brakeman, and when he had time he was on the engine as flagman, pilot.

3524 Q. You say you heard the emergency go on?

A. Yes sir.

3525 Q. Explain that.

A. That is the air brake is put on in emergency, that is to stop at once.

3526 Q. Now, who did that, who applied the emergency?

A. Mr. Wright.

3527 Q. That is he was applying the emergency brake; is that the same as reversing the Engine?

A. Why it has the same tendency, yes.

438 3528 Q. But the emergency brake was applied?

A. Yes sir.

3529 Q. And by whom?

A. Mr. Wright.

3530 Q. And what do you say that means, or the effect or purpose of it when the emergency brake is applied?

A. To stop.

3531 Q. To stop how or when?

A. As soon as he can.

3532 Q. Is there any quicker way of stopping than applying the emergency brake, that is the quickest way of stopping?

A. They generally always reverse the engine when they stop quick, or if you have to reverse the engine and use all air.

3533 Q. That was what was done that day?

A. Yes sir.

3534 Q. You know that?

A. Yes sir.

3535 Q. And did you hear anybody yell or call on your engine?

A. Yes sir.

3536 Q. Who was it?

A. Mr. Wright.

3537 Q. What did he say?

A. He said "For God's sake jump."

3538 Q. Did he call anybody by name?

A. No sir.

3539 Q. Who did he say that to?

A. Why to me and the flagman, I suppose.

3540 Q. And, when did he say that with respect to the time that you felt the emergency brake going on?

A. Just when he used the brakes.

3541 Q. He used the brakes and then yelled?

439 A. Yes sir.

3542 Q. State whether you did jump?

A. I did.

3543 Q. State whether you noticed Mr. Hinitt at that time?

A. I did.

3544 Q. Who jumped first, you or he?

A. Mr. Hinitt jumped first.

3545 Q. You say Mr. Hinitt jumped first; on which side?

A. Left side.

3546 Q. On which side did you jump out?

A. Left side.

3547 Q. When you say the left side, which would that be, east or west?

A. That would be; well, I don't know.

3458 Q. If it was going north, it would be which way?

A. It would be on the west side.

3549 Q. And you say that you did not see switch engine 1220 at all until after you jumped?

A. No I didn't see it.

3550 Q. What had you been doing immediately before the emergency brake was applied and you jumped, do you remember?

A. I don't remember what I was doing, I was down in the deck, or down off the side of either one, standing down in the deck.

3551 Q. How do you remember that?

A. I remember looking up and seeing Mr. Hinitt going out of the window.

3552 Q. Saw Mr. Hinitt going out of the window?

A. Yes sir.

3553 Q. What window?

A. Side window.

3554 Q. Cab window?

A. Yes sir.

440 3555 Q. Where is that cab window with respect to the place between the coal car and the engine?

A. Well there is an entrance to the engine, and one back board in the engine, and then there is a seat on each side, you know.

3556 Q. The seat is right below the window?

A. Yes, right below the window.

3557 Q. When you speak of the entrance, is that between the coal car and the engine proper?

A. Yes sir.

3558 Q. And, if your Engine was going north, the window would be which way from the entrance, that you say he jumped out of?

A. It would be west from the main entrance to the boiler.

3559 Q. Yes, but if the engine was going north, and here is the entrance, where is the window, north or south? (Attorney indicating.)

A. You mean, if the engine was going north, which way the window would be from the entrance?

3560 Q. Yes sir.

A. It would be north.

3561 Q. How did you say Mr. Hinitt got off?

A. Through the window, right through the window of the cab.

3562 Q. Did you observe how he lit on the outside?

A. No sir.

3563 Q. Where did you jump out?

A. Between the engine and tank.

3564 Q. The entrance is the usual entrance?

A. The side entrance to the engine.

3565 Q. I wish you would state whether you jumped sideways or straight westward, straight outward?

441 A. Straight outward.

3566 Q. And how did you light?

A. Lit on my feet.

3567 Q. And, didn't fall?

A. No sir.

3568 Q. Now if the engine was going north, and you jumped out of the entrance, your face would be which way?

A. West.

3569 Q. You may state whether your face was straight west, if the engine was running straight north.

A. That is the way I jumped out of the engine, straight west.

3570 Q. You say you lit on your feet?

A. Yes sir.

3571 Q. You didn't swing sort of frontwards, have ahold of the engine?

A. No.

3572 Q. Mr. McLane, if you had staid in the fireman's place, going northward as you were that day, state if you could have seen an approaching train coming from the other way?

A. I could have seen yes, if I had my neck stretched away out, that is if I had been leaning way out looking for it.

3573 Q. In the place where the fireman's place is, right in front, is there a window there on the engine any place?

A. Yes sir.

3574 Q. If you had set inside looking in the glass, could you, under any circumstances, detect an approaching train?

A. I might have, if it would have been close enough.

3575 Q. Where is that curve?

A. Right east of Lincoln.

3576 Q. Where is that curve with respect to the viaduct?

A. Starts right at the viaduct.

3577 Q. The curve swings which way, you say, to the right or left?

442 A. To the right.

3578 Q. State to what extent of a curve there is there.

A. I don't know anything about that.

3579 Q. Well it is a sharp curve?

A. A very sharp curve.

3580 Q. I will ask whether you have been accustomed to run over that road since?

A. Yes sir.

3581 Q. Since Mr. Wright's death?

A. Yes, since Mr. Wright's death.

3582 Q. Refreshing your memory, you did testify at the Coroner's inquest; I will ask you at that time whether you stated that sitting on the left side of the engine, it was impossible to see an approaching train coming from the other way, did you testify that at that time?

A. Well it would to a certain extent, that is the way things were that time.

3583 Q. The engine running north, and curve swinging around that way, unless you leaned clear out, you couldn't see anything coming?

A. Yes sir.

3584 Q. That is the fact about it?

A. Yes sir.

3585 Q. How long before Mr. Hinitt jumped out that you followed him?

A. Just as soon as I could go.

3586 Q. Did he light before you did, or you light before he did? Do you remember seeing him there when you got down?

A. Yes I remember seeing him when I was down, I remember he was down before I was.

3587 Q. You mean off from the engine?

A. Yes sir.

3588 Q. Do you remember whether he was northward, toward the front of the engine or backwards?

443 A. He was right in front of me.

3589 Q. Right in front of you?

A. Yes sir.

3590 Q. Then he jumped before you did and still you landed north or south of him?

A. I landed right back.

3591 Q. When you say back, you mean south, this way?

A. Yes, that would be south.

3592 Q. That is, he was towards, he was nearer the front end of the engine than you were?

A. Yes sir.

3593 Q. I will ask you whether you ever measured the distance from the viaduct north to the place where the collision took place?

A. No.

3594 Q. Do you know when it was that you first saw the other engine, the switch engine 1220?

A. Yes sir.

3595 Q. When?

A. Just after I lit on the ground, they hit about the same time I lit on the ground.

3596 Q. How soon after he applied the emergency, did you jump?

A. Just as soon as I could.

3597 Q. Did you ever investigate or try to find out to see how far an engine going north, could see a train coming from the north, going southward?

A. No sir.

3598 Q. Would you be willing to risk your judgment as to how many car lengths a person could see an approaching train going around that curve?

A. No, I don't believe I would.

444 3599 Q. State whether there was a collision there, between your engine and 1220?

A. Yes sir.

3600 Q. State whether the engines jumped the track.

A. One of them did.

3601 Q. Which one?

A. The switch engine.

3602 Q. What about your engine?

A. Staid on the rail.

3603 Q. Where did you see Jackson, I mean Mr. Wright?

A. At the time of the accident

3604 Q. Yes sir, after you jumped, where did you first see Mr. Wright?

A. Between the tank and the engine?

3605 Q. On which side of the engine?

A. On the west side.

3606 Q. How did you get over there?

A. That is where I jumped off, on that side.

3607 Q. Oh, Mr. Wright you say was between the tank and the engine on the left side where you jumped off?

A. Yes sir.

3608 Q. You may state whether the engines stopped dead still immediately after the collision, shortly afterwards?

A. Yes sir.

3609 Q. And did you go right there where Mr. Wright was?

A. As soon as we could.

3610 Q. Well you run right up there?

A. Yes sir.

3611 Q. You may state what the condition of the ground was on the left side at that time.

A. I don't remember.

3612 Q. You don't remember?

445 A. No sir.

3613 Q. State the position of Mr. Wright and the engine there.

A. Well he got in between the engine and tank.

3614 Q. What part of his body was between the engine and tank?

A. His hips.

3615 Q. Above or below?

A. Right on the hips.

3616 Q. Was his whole body between the engine and tank about the hips?

A. Just his hips was all there.

3617 Q. Well, the width of the whole body?

A. Yes sir.

3618 Q. State whether you were there all the time until Mr. Wright was gotten out of the engine.

A. Yes sir.

3619 Q. State how long it took to get him out?

A. It was said forty-five minutes.

3620 Q. It was said forty-five minutes?

A. Yes sir.

3621 Q. Did he live during the whole time?

A. Yes sir.

3622 Q. Was he alive when he was taken out?

A. Yes sir.

3623 Q. Do you know how long he lived after he was taken out?

A. 9:45 I believe the next morning.

3624 Q. Now do you know that of your own knowledge?

A. That was what I was told.

3625 Q. Did you see him when he was taken away that day?

A. Yes I seen him.

3626 Q. Where?

A. At the Hospital.

446 3627 Q. When?

A. That evening.

3628 Q. Was he living then?

A. Yes sir.

3629 Q. What time that evening?

A. I don't know what time it was.

3630 Q. Well, was it after six?

A. I don't know.

3631 Q. What Hospital was it?

A. I don't remember that either.

3632 Q. Was it down in the south part of Lincoln?

A. I don't remember which direction it was.

3633 Q. But you saw him that evening, but you wouldn't say whether before six or after six?

A. No.

3634 Q. Did you see him again alive?

A. Not after that evening.

3635 Q. Do you know when he died?

A. I was told, I don't know.

3636 Q. What did they tell you?

A. 9:45.

3637 Q. That night?

A. The next morning.

3638 Q. Do you know the occasion of the delay in getting him out, why that was?

A. Yes he was fastened between the engine and tank.

3639 Q. Did you have to go away off to get some tools?

A. I was right there all the time.

3640 Q. State what you did about getting tools to get him out, if anything?

A. Well, I didn't help get, any tools.

447 3641 Q. Well, what do you know about the tools being gotten to get him out, down town or else where?

A. Well, I don't know anything about that either.

3642 Q. State what you know about the engine not having any axes or other implements or hardware or something to use to get him out?

A. I don't know what was on the engine.

3643 Q. You don't know?

A. No.

3644 Q. State what was done to get him out.

A. Well they put jacks in between the engine and tank, and jacked the tank back so we could remove him from where he was.

3645 Q. You say he was fastened between the tank and the engine did you?

A. Yes sir.

3646 Q. Now on the west side, the same side where you jumped out, now that is the entrance is it?

A. Yes sir.

3647 Q. To the engine?

A. Yes sir.

3648 Q. The tank is right north the coal car, or it is the coal car?

A. Yes sir, it is the coal car.

3649 Q. And the engine would be immediately north, and you say he had been caught in between there?

A. Yes sir.

3650 Q. Was he above or below on the platform of the engine?  
A. Above the level of the platform of the engine.

3651 Q. Where were his feet with respect to the platform of the cab, the floor of the cab, higher or lower?

A. I don't remember where his feet were.

3652 Q. Well where was it he was caught? Was it right at the platform of the floor of the cab and water tank, or was he caught higher up?

448 A. He was caught up above the floor.

3653 Q. What would there be to catch him?

A. The tank sliding forward.

3654 Q. Well was it the bottom of the tank that caught him or the top of the tank?

A. The whole tank.

3655 Q. The whole tank was thrown which way?

A. Thrown ahead.

3656 Q. Against the engine?

A. Yes sir.

3657 Q. Against the cab of the engine?

A. Yes sir.

3658 Q. And he was pinioned there?

A. Yes sir.

3659 Q. Then where he was pinioned, it was above the floor of the cab?

A. Yes sir.

3660 Q. Now, Mr. Witness, the water tank is about as high as a man's shoulder if you stand on the floor of the cab?

A. Pretty near.

3661 Q. Now if the whole tank slid northward, how was it that he was pinioned at the hips, was his head in and his feet out, or his head out and his feet in, or was he standing straight up?

A. His head was out.

3662 Q. His feet in the cab?

A. I don't know whether his feet were in the cab or not.

3663 Q. Tell where his head was?

A. His head was out in the clear of the engine.

3664 Q. Out in the clear of the Engine?

A. Yes.

3665 Q. State what his position was pinioned there, was he standing up straight or stooping forward, downward.

449 A. He was leaning out, that is from above his hips.

3666 Q. Above his hips leaning out; and was he leaning out straight westward?

A. Straight out from the engine?

3667 Q. That is what I mean.

A. Yes.

3668 Q. Did he sustain himself, or did his head fall down over his body downwards?

A. He kind of dropped down.

3669 Q. Did he do any talking while he was pinioned there forty-five minutes?

A. Yes.

3670 Q. Did you take part in putting the jacks under and trying to get him out?

A. Yes sir.

3671 Q. What was done to get him out?

A. Well everything that could be done.

3672 Q. Describe what was done, how did they get him out, did they move the tank back?

A. Yes they jacked the tank back, placed jacks against the engine and jacked the tank back.

3673 Q. Could you tell from the time you heard the emergency brake go on until you lit on the ground, about how far you run?

A. No sir.

3674 Q. Well, how much time elapsed between the time you heard the emergency brake go on, from the time you lit on the ground?

A. There wasn't much time elapsed.

3675 Q. And you got out as soon as you could?

A. Yes sir.

3676 Q. When the emergency brake went on, state where you were with reference to the viaduct, if you can.

450 A. Well, I can't do that.

3677 Q. You had gone under it?

A. I don't know.

3678 Q. You don't remember?

A. No.

3679 Q. But from the time the emergency brake went on, until you lit; you got off just as quick as you could, did you?

A. Yes sir.

3680 Q. And you were standing; where were you standing when you heard the emergency brake go on, or felt it, were you loose and free, close to the entrance of the cab?

A. Yes, I was standing right down, just right down in the deck, looking up toward the flagman.

3681 Q. You were not engaged?

A. I don't think I was.

3682 Q. Were you looking at Mr. Wright?

A. I couldn't say that.

3683 Q. Have you any recollection of seeing him about then?

A. After I seen the brakeman jump, I don't know whether I seen him or not, I couldn't say.

3684 Q. Well what I want to get at is, the very moment you heard the emergency brake go on, you were free to jump?

A. Yes sir.

3685 Q. And you did jump?

A. As soon as I seen the flagman go, I did jump.

3686 Q. Now then, the place where you jumped off, where you lit on the ground, and the place where the collision took place, of course the engine stopped and came to a dead stand still, how far was it?

A. It wasn't very far.

451 3687 Q. Well refresh your memory and give us your best recollection as to how far you walked from the place where you lit, to the place where you helped to get Mr. Wright out from the place where he was pinioned?

A. Well, I had to run back, back towards the back of the tank to get around on the other side of the engine to get up in the cab.

3688 Q. You got in the cab from the other side?

A. Yes sir.

3689 Q. That is the first thing you did?

A. Yes sir.

3690 Q. Then do I understand you that the water tank or coal car had not cleared the place where you were?

A. Had not cleared the place where I came out.

3691 Q. What do I understand you to mean when you say you had to run back to get on the other side of the engine?

A. Well, to get around the engine, I had to run back from where I stood when I jumped.

3692 Q. Run back which way?

A. Towards the back ends of the tank to get on the other side.

3693 Q. Towards the viaduct?

A. Yes sir.

3694 Q. That would be running across the viaduct?

A. Yes sir.

3695 Q. Northward, and then walked by the tank into the engine?

A. Yes sir.

3696 Q. When you run back there, state whether the engine had come to a stop.

A. The engine had come to a stop and was going the other way.

3697 Q. Going which way?

A. Going back towards the viaduct.

3698 Q. Well, did it run back far?

452 A. It run back a little ways, I don't know just how far it went.

3699 Q. Where was switch engine 1220?

A. It was standing there still.

3700 Q. Was it on the track, or thrown off?

A. Off the track.

3701 Q. Clear off?

A. Off on the ground.

3702 Q. On which side of the track?

A. I don't know which side it was off.

3703 Q. Well in going northward, on the right side or left side?

A. You mean on which side the engine was off?

3704 Q. On which side of the railroad track was the switch engine lying?

A. It wasn't clear off the track, just off the rail.

3705 Q. Well, where it was off from the rail was it tipped over or standing up?

A. Standing up.

3706 Q. If it was off from the rails, it was off either eastward or westward?

A. Yes.

3707 Q. Which way was it?

A. I don't remember.

3708 Q. Standing parallel with the track or sideways?

A. Standing parallel with the track.

3709 Q. You say you did see Mr. Hinitt north of you after you got on the track?

A. Right in front of me.

453 3710 Q. Standing up?

A. Yes sir.

- 3711 Q. You didn't see him laying down at any time that day?  
A. No I didn't.
- 3712 Q. Well when he jumped, state what you saw of him whether standing up or lying down.  
A. Well, I don't know where he was when I jumped.
- 3713 Q. When you see him I mean.  
A. When I seen him, he was standing up.
- 3714 Q. I wish you would explain how he could jump out of the window.  
A. How he could jump out?
- 3715 Q. Yes sir, the window is small and high up.  
A. Well it isn't very small, get out very easily.
- 3716 Q. Could a man jump out and light on his feet? Wouldn't he have to stick his head out and fall out?  
A. That is the way Mr. Hinitt went out.
- 3717 Q. Describe the size of the window.  
A. Well, it is about three or four feet long, three feet high I suppose.
- 3718 Q. When you say three or four feet long, you mean not up or down but sideways? (Attorney indicating.)  
A. Yes sir.
- 3719 Q. How far up and down?  
A. Three and one-half feet.
- 3720 Q. You saw him go out head first?  
A. Yes sir.
- 3721 Q. You don't know how he lit?  
A. No.
- 3722 Q. Did you see any flagman in that curve that day?  
A. No sir.
- 3723 Q. Do you know whether there was a semaphore in the curve that day?  
454 A. No, there wasn't.
- 3724 Q. There wasn't?  
A. No.
- 3725 Q. Did you, yourself, that day know anything about switch engine 1220, where it was?  
A. No sir.
- 3726 Q. You say you did not?  
A. No.
- 3727 Q. Do you know what your running orders were out of Lincoln?  
A. No sir, I don't remember.
- 3728 Q. How?  
A. I don't remember.
- 3729 Q. Who did you say said "For God's sake jump"?  
A. Mr. Wright.
- 3730 Q. How do you know?  
A. Cause I knew by his voice.
- 3731 Q. You are sure it was he?  
A. Yes.

3732 Q. And it was the reversing of the engine that you felt, and his crying out to jump that made you get out?

A. Hearing the emergency go on, and the air.

3733 Q. His calling out?

A. Yes, he called out "For God's sake jump" after he put on his air brakes, and I had already started as soon as I heard him put on the emergency.

3734 Q. What made you jump when the emergency was going on, and you hadn't seen the other engine?

A. I knew they wouldn't be putting air in the emergency without there was something going to happen.

3735 Q. That is, whenever anything of that kind is done by the Engineer, you know there is trouble?

455 A. Yes sir.

3726 Q. Serious trouble?

A. Yes sir.

3737 Q. Immediately before that, before you heard the emergency go on, and before you heard Mr. Wright say "For God's sake jump," had you heard a whistle blowing on any other train on the track?

A. No sir.

3738 Q. Of course, as a fireman, you would hear whistles blow on the train on the track or near there?

A. Not always.

3739 Q. Well on this particular day, shortly or immediately before the emergency brake was applied by Mr. Wright and you jumped, you heard no whistle you say?

A. I heard none.

3740 Q. Did you hear any bell?

A. None except ours.

3741 Q. State whether your bell was ringing?

A. Yes sir.

3742 Q. How was your bell run-, by an automatic bell, steam or by rope?

A. Well, the flagman, Mr. Hinitt was ringing it.

3743 Q. Well do you know that?

A. Yes sir.

3744 Q. You are sure it was ringing?

A. I am pretty sure, yes.

3745 Q. You heard it?

A. Yes.

3746 Q. Did you know where the yard limits were at that time?

A. Yes sir.

3747 Q. You may explain what you as a railroad men, understand is meant by running under control.

456 A. Running under control is to be able to stop within the distance you can see ahead when track is clear.

3748 Q. Then running under control doesn't mean, arbitrarily two miles, five miles or seven miles?

A. It means to be able to stop within the distance you can see the track is clear ahead.

3749 Q. My question is that there is no arbitrary speed fixed, which means under control, it depends upon the circumstances and surroundings at the time?

A. Yes it depends on what kind of a piece of track you are going on.

3750 Q. Under some circumstances five miles might be under control, and again under other circumstances ten or fifteen miles might be under control, or two or three miles, depending upon the tracks and surroundings at the time, is that right?

A. Yes sir.

3751 Q. What I want to get clear is that under control or not under control don't mean three miles, or if you are running three you are under control, or two and one-half miles you are not?

A. What it means is to be able to stop within the distance you can see ahead when track is clear.

3752 Q. Then there is no fixed speed which means under control or not under control?

A. Well there is a fixed speed at certain places.

3753 Q. Well I mean if you don't know the place you can't fix the speed?

A. I don't know as to that.

3754 Q. Well, Mr. McLane, when you jumped, what will you say as to whether the Engine had slackened any at that time?

A. I couldn't tell.

3755 Q. Well now, when you jumped out, didn't it throw you over on your head?

457 A. No sir.

3756 Q. Didn't you have a hard time standing up?

A. Not very.

3757 Q. Didn't it throw you against Mr. Hinitt?

A. No sir.

3758 Q. How far north of you or toward the front end of the engine was he?

A. I wouldn't say how far he was ahead of me; he was ahead of me.

3759 Q. State whether you heard either a bell or whistle from the switch engine before the collision?

A. No sir.

3760 Q. State whether you know from your surroundings there, that day, if you know where Mr. Wright was, when you heard the reverse going on of the emergency brake?

A. Why he was up on the right side of the engine, he was up in his place.

3761 Q. He was in his place?

A. Yes sir.

3762 Q. Of course if he applied the reverse on the emergency brake, he must have been, isn't that true?

A. Yes sir.

3763 Q. You say that you had no car at all, no cars or anything?

A. No cars.

3764 Q. All you had was the engine and coal car, water tank?

A. Just a lone engine.

3765 Q. Then, immediately before you heard the reverse going on, where do you say the flagman was?

A. The flagman was on my seat box, before the emergency went on.

3766 Q. What was he doing there?

A. He was there ringing the bell.

458 3767 Q. And just immediately before that, where was Mr. Wright?

A. Over on his side.

3768 Q. And where were you?

A. I was standing down on the deck.

3769 Q. Facing which way, which way with respect to the flagman?

A. Looking toward the flagman.

3770 Q. Can you throw any more light upon the question as to whether the engine had slackened any when you jumped, from its regular speed along there?

A. No, I can't tell.

3771 Q. Well do you think it did or didn't?

A. Well, I wasn't watching how fast we were going, I don't know whether it slackened any just as I jumped or not.

3772 Q. How soon did you jump after you heard the reverse going on?

A. I was on my way to getting out as soon as I heard it.

3773 Q. Then you jumped as soon as the emergency was being applied, is that right?

A. Yes, while it was being applied.

3774 Q. You say you couldn't tell how fast you were going?

A. No, that is when he was putting on the air.

3775 Q. Well when he was putting on the air?

A. I don't know whether it slackened any or not then.

3776 Q. Was the ground hard or soft there that day, when you lit?

A. Don't know whether it was hard or soft, it didn't hurt me any.

3777 Q. Did you light on the level or where there was a ditch or excavation of any kind?

A. I don't remember.

3778 Q. Were you running under control?

A. I don't know that either.

3779 Q. Refreshing your memory, at the Coroner's inquest, you testified on that subject?

459 A. It has been so long. I can't recollect.

3780 Q. What's strange to me is that it didn't throw you down, can you explain how that was, did you make any special effort, you were just trying to get out?

A. I was just trying to get out.

3781 Q. Just jumped out?

A. Yes sir.

3782 Q. Is it the same engine that was brought from Phillipsburg the day before?

A. Yes sir.

3783 Q. Now just to refresh your memory, and for no other purpose, at the Coroner's inquest, I will ask if you weren't asked this question?

3784 Q. Did you know what the limit is in the yards, the speed limit?

A. No sir, I do not.

3785 Q. The speed limit is slow I suppose in the yard limit?

A. You are supposed to be under control when inside of the yard limits.

3786 Q. Were you?

A. Yes sir.

3787 Q. You think you was?

A. Yes sir, we was under control the best we could, I thought we were under control, at least.

3788 Q. Now I will refresh your memory from your testimony of that time, as to your recollection, how you were running, under control or otherwise?

A. I don't remember now, it has been so long ago.

3789 Q. Could you give any light on the question of your running orders from Fairbury to Council Bluffs?

A. No I don't think I could.

460 3790 Q. Those orders that you got along the way, or here at Fairbury, who would have possession of them, the Engineer or Fireman?

A. The Engineer.

3791 Q. Have you got any of those orders now?

A. No sir.

3792 Q. Isn't it a fact that a fireman gets a copy of the orders?

A. No sir.

3793 Q. And who gives those orders? Train Dispatcher?

A. Train Dispatcher.

3794 Q. Well, there is no train dispatcher at Jansen?

A. There is an Operator, I don't know whether there is a Dispatcher there or not.

3795 Q. If you got an order at Jansen, you would get it from the operator?

A. Yes sir.

3796 Q. Suppose you got an order at Lincoln, Nebraska, who would you get it from?

A. I suppose the Operator.

3797 Q. Do you know whether on that day you got an order at Lincoln?

A. No, I do not; I don't remember.

3798 Q. Do you know from what place to what place you had an order, when you were running from Lincoln to Havelock?

A. No sir, I don't remember.

3799 Q. You don't remember?

A. No sir.

3800 Q. At any rate, have you any of those orders yourself, in your possession?

A. No sir.

3801 Q. Or copies?

A. No sir.

3802 Q. Can you get any of those, any of those orders on that day?

461 A. No sir, I don't think I can.

3803 Q. Now you say that you have gone through, under that viaduct, and through that sharp curve before this time, when Mr. Wright was killed, and since that time?

A. Yes sir.

3804 Q. Do you remember in going northward, the viaduct, on what it rests, whether on stone or wooden pillars.

A. On piling, on wooden piling.

3805 Q. Wooden piling?

A. Yes sir.

3806 Q. You may state, we will say on the right, whether there is a great number of piling up until it reaches the earth, if you know?

A. I never noticed that.

3807 Q. How about to the left or to the west, in going northward?

A. I never took particular note, all I know it was piling.

3808 Q. Do you know how close those piling come on either side to the engine itself, how far distant the piling are either way?

A. No sir.

3809 Q. Well do you know whether they are quite close or far removed?

A. I couldn't tell.

3810 Q. Do you know about the excavation in the cut, how deep about?

A. No sir.

3811 Q. Do you know how far the embankment, we will say to the right of the track going north is from the track?

A. No sir.

3812 Q. Or the embankment on the left side, the side you were on?

A. No sir.

3813 Q. Do you know whether the embankment is highest, going north, on the right side or left side, on the other side of the viaduct?

462 A. I don't know.

3814 Q. You may state if you know, since that time, whether the defendant has put in a semaphore in the curve?

Objected to as wholly immaterial and incompetent.

Sustained.

Exception.

3815 Q. You may state if you know, whether in that same curve, either before or after Mr. Wright lost his life, any other man was killed there?

Objected to as immaterial, irrelevant and incompetent not within the issues of this law suit, and no foundation laid.

Sustained.

Exception.

3816 Q. Don't you know that one Mr. Disher was killed in that same cut?

Objected to as immaterial, irrelevant and incompetent not within the issues of this law suit, and no foundation laid.

Sustained.

Exception.

3817 Q. Do you know that there was a collision there shortly after Mr. Wright was killed?

Objected to as immaterial, irrelevant, incompetent; no sufficient foundation laid, not within the issues of this law suit, and misleading.

Sustained.

Exception.

3818 Q. Did you hear the crash that day of the collision?

A. Yes sir.

3819 Q. A loud crash.

A. Oh, it made quite a little noise.

3820 Q. Did either of the engines get on fire?

A. No sir.

3821 Q. You say your engine was left right on the track?

A. Yes sir.

3822 Q. Was it injured much?

A. Why the front end of it was.

3823 Q. Well, explain to what extent the front end of your engine was demolished or injured.

463 A. Just the front end casting, and smoke box was mashed.

3824 Q. Yours was a regular engine with cow catcher on?

A. Yes sir.

3825 Q. Was that broke off?

A. Yes sir.

3826 Q. And what else do you say was done?

A. The smoke box was busted.

3827 Q. The smoke box busted; you mean the smoke stack?

A. The big casting where the smoke stack is connected on.

3828 Q. Anything else on your engine?

A. Nothing but the tank, the tank was busted.

3829 Q. What about the other engine?

A. Well the front end of it was injured same way and busted up.

3830 Q. State the fact about the other engine being used up more or less, the switch engine?

A. No, I don't think it was.

3831 Q. Thrown off the track you say?

A. I know, but the other engine was fired up after that, and took to Fairbury.

3832 Q. How about your engine?

A. The other engine pulled it in.

3833 Q. The other engine pulled it in?

A. Yes sir.

3834 Q. Did you pull it in?

A. I fired on the engine and pulled it in.

3835 Q. Do you know why you were going from Fairbury to Council Bluffs with a lone engine that day?

Objected to, not proper foundation, and calling for a conclusion. immaterial irrelevant, and incompetent.

Sustained.

Exception.

3836 Q. What for?

464 Objected to, not proper foundation, and calling for a conclusion, immaterial, irrelevant, and incompetent.

Sustained.

Exception.

3837 Q. Taking it up for repairs?

A. Yes sir.

3838 Q. Of course, after the collision, a large number of people gathered around there?

A. Yes, there were a few around there.

3839 Q. Now, Mr. McLane, you never had talked with me before you were sworn and testified in this deposition, had you, to your recollection, with me?

A. I don't remember of it.

3840 Q. You were subpoenaed to give your deposition on behalf of the plaintiff, you had a subpoena served on you?

A. Yes sir.

3841 Q. You may state, whether since the service of the subpoena, Counsel for the railroad, or anybody, discussed this with you, last night?

A. You mean, discussed this here?

3842 Q. Yes, talked over the happening.

A. No, not in this way.

3843 Q. Now did Judge Holmes, Mr. De Lacy of this other gentleman last night, talk about it, or did they see you?

A. I seen Mr. Holmes last night.

3844 Q. Up in the Hotel?

A. Yes sir.

3845 Q. Talked it over, this accident?

A. No, we talked some of it, but not much.

465 Cross-examination by Judge Holmes:

3846 Q. Where was your home, Mr. McLane, at the day of this accident?

A. My home?

3847 Q. Yes.

A. Here at Fairbury.

3848 Q. You lived here how long?

A. About fourteen years.

3849 Q. You have been railroading how long?

A. Well, I have been firing for three years?

3850 Q. Then you were in railroad service prior to that time?

A. I was in the Round House previous to that.

3851 Q. You remember what time the day it was you left Fairbury for Lincoln?

A. No sir, I don't remember.

3852 Q. Was it morning or afternoon, I don't mean the exact time, but what part of the day?

A. Well, I believe it was in the afternoon, I couldn't say for sure what time.

3853 Q. What time did you get to Lincoln, about?

A. I don't know that either?

3854 Q. About what time of day was it when this accident occurred?

A. They said about 2:30.

3855 Q. 2:30?

A. About 2:30.

3856 Q. Same day you started from Fairbury?

A. Yes sir.

3857 Q. Where are they located?

A. They are located about a mile and half out I should judge from the depot.

3858 Q. Where were they located in reference to the City pumping station in Lincoln?

466 A. Well it's going into Lincoln, I don't know the direction.

3859 Q. Well going into Lincoln from Fairbury where would be the yard limit on that side of town?

A. I think it is out towards that Overhead bridge, coming out of town from the waterworks.

3860 Q. Where the Bishop's Orphanage is, you know where that is?

A. I don't know where that is, it is somewhere near that street car crossing.

3861 Q. Near the overhead bridge that crosses the Burlington, how far from that bridge?

A. That crosses the Burlington?

3862 Q. Where the Rock Island crosses the Burlington.

A. Yes, out that way.

3863 Q. How far from that bridge, as near as you can estimate?

A. Why a half a mile or quarter of a mile.

3864 Q. Towards Lincoln?

A. Yes.

3865 A. Now, where are the yard limits on the east, after you pass through Lincoln?

A. I think they are close to 27th St.

3866 Q. Is that the limit?

A. Out there somewhere, right close to it.

3867 Q. How far would that be, how far would the yard limit

on the other side of the Holdredge street viaduct, that we have been talking about?

A. Close on to a half a mile farther east.

3868 Q. So you are confident that the Holdredge street viaduct, and the place where the accident occurred, was within the yard limit of the City of Lincoln?

A. Yes sir.

3869 Q. You left Lincoln about 2:30 you think?

467 A. I don't know when we left there, but somebody told me 2:30 is when the accident occurred.

3870 Q. Someone told you 2:30?

A. Yes sir.

3871 Q. How far from the depot in Lincoln, to the place of this accident?

A. About a half a mile, I should judge, maybe a little more and maybe a little less.

3872 Q. Now you were on the left hand side of the engine as you were going east?

A. Yes sir.

3873 Q. When you reached the viaduct, were you looking out of your side?

A. No sir, I was down in the deck.

3874 Q. Well, when you are in the engine, going east, and when you reach the viaduct, how far can you see ahead on the track on your side?

A. Well, I don't know just how far.

3875 Q. Little bit less than fifty feet from the viaduct?

A. I don't know, I wouldn't say how far.

3876 Q. Did you ever have occasion to look to the east from the right hand side of the engine?

A. Not that day.

3877 Q. But other days I mean?

A. Yes, I have looked out.

3878 Q. When by the viaduct, how far can you see eastward from the right hand side?

A. Well I couldn't say how far we could see there.

3879 Q. You don't know.

A. No.

3880 Q. Upon this day, when you approached the viaduct, what rate of speed was your engine going?

468 A. Well, I don't know.

3881 Q. As near as you can tell?

A. I don't know how fast we were going, before he put on his air brake.

3882 Q. Well I mean before any emergency brakes were applied, and as you approached the viaduct, at what rate of speed would you say you were going?

A. I don't know.

3883 Q. Haven't you ever said?

A. Well, I don't know whether I did or not.

3884 Q. Hasn't your attention been called repeatedly from the time of that accident, to the rate of speed your engine was going.

3885 Q. You testified at the Coroner's inquest you say?

A. Yes sir.

3886 Q. I will ask you Mr. McLane, if this question was asked of you: Question: How fast do you think you were going?

A. Why about ten miles an hour.

3887 Q. Was not that question asked you and that answer made?

A. Well that was probably right because I maybe thought that way at that time. I don't remember when I jumped. You mean before he used the emergency?

3888 Q. Yes sir?

A. I don't know now how fast he was going.

3889 Q. Now I didn't ask that, I asked you if this question was asked you at the time you answered at the Coroner's inquest, What do you say to that?

A. I don't know how fast we were going.

3890 Q. I asked you whether this question was not asked you and if you did not give that answer to the question?

A. What was that?

469 3891 Q. Question, how fast do you think you were going, and you answered: Why about ten miles an hour.

A. Well if I said that, it was probably right; it has been so long ago.

3892 Q. Now I will ask you if this question was not asked you at the time you testified at the Coroner's inquest: Question, you think you were moving about ten miles an hour?, and your answer was: "Yes sir?"

A. I guess that is what I gave all right.

3893 Q. Now, Mr. McLane, you may state what your best judgment is as to the rate of speed your engine was going at the time the emergency brake was applied?

A. I don't know how fast we were going at the time it was applied.

3894 Q. What is your best judgment?

A. I haven't any, I don't know.

3895 Q. Now, when you jumped off that engine, whereabouts was the viaduct?

A. Right back of the engine.

3896 Q. What?

A. Right back of the engine, south of the engine.

3897 Q. The viaduct was south of the engine?

A. Yes.

3898 Q. You had passed the viaduct then when you jumped?

A. Yes.

3899 Q. Had you?

A. When I jumped, yes.

3900 Q. You had passed the viaduct?

A. Yes sir.

3901 Q. How far were you from the viaduct when you landed on the ground.

470 A. Well I don't know exactly.

3902 Q. About how far?

A. Well about fifty yards, maybe 75, somewhere around there.

3903 Q. Fifty or seventy-five yards beyond the viaduct, east you think?

A. Yes sir.

3904 Q. The moment you landed on the ground, the engines collided did they.

A. Just a few seconds afterwards.

3905 Q. You didn't get off any too quick?

A. No.

3906 Q. And, how far was the switch engine then from you at the time of the collision?

A. At the time of the collision?

3907 Q. Yes.

A. Why it was about, well just the length; I don't really know just how far, it wasn't very far.

3908 Q. About?

A. I couldn't tell you how far it was.

3909 Q. Well was it fifty feet or one hundred feet?

A. No, it wasn't very far.

3910 Q. No, but that is very indefinite?

A. It might have been twenty-five.

3911 Q. It might have been twenty-five feet from where you stood?

A. It might have been less, it might have been more, somewhere around there.

3912 Q. At the time you jumped off, had your engine slackened its speed?

A. I couldn't tell you that, whether it had slackened or not.

3913 Q. The bell on your engine was ringing as you went through there?

A. Yes sir.

3914 Q. Did you hear any bells ringing or whistles blowing on the switch engine?

A. No sir.

471 3915 Q. You know that the switch engine was in the yards, didn't you?

A. I knew there was one there, yes sir.

3916 Q. And it was your duty to be on the lookout for that, or the Engineer's duty when in the yards?

A. Why we are always supposed to kindly look out for them?

3917 Q. You hadn't seen a switch engine any place when you had been in the yards?

A. No I hadn't seen it.

3918 Q. How did you know where the yard limits were?

A. How did I know?

3919 Q. Yes, does the Company have boards or something to indicate?

A. Yes, they have a board up to tell.

3920 Q. You have seen those boards repeatedly?

A. Yes sir.

3921 Q. Did you have a time table in your possession at the time you were going through the yards?

A. I don't think so.

3922 Q. Did Engineer Wright?

A. Yes, I think he did.

3923 Q. Did you see him occasionally use the time table?

A. Yes sir.

3924 Q. Do you know what time table that was Mr. McLant?

A. No, I don't remember.

3925 Q. Let me refresh your memory, do you remember that it was time table "11 D"?

A. No, I don't remember what the number was.

3926 Q. Did you have a book of rules, did they give firemen a book of rules, at that time?

A. Yes sir. I don't suppose I had mine with me.

3927 Q. But you had one to study?

A. Yes sir.

3928 Q. Do you know whether the Engineer has one, whether they give him one?

472 A. Yes sir.

3929 Q. Did Mr. Wright have one?

A. I don't know whether he did or not?

3930 Q. You didn't see it?

A. No sir.

3931 Q. Did you have any conversation with Mr. Berge?

A. No sir.

3932 Q. Did you have any conversation with some one representing him?

A. No sir.

3933 Q. Someone representing the Attorney for the plaintiff?

A. No, never had any conversation with anybody.

3934 Q. Was there anybody that represented him or that represented the plaintiff, I mean?

A. Not that I know of.

Redirect examination by Mr. Berge:

3935 Q. You said that you were fifty or seventy-five yards beyond the viaduct; is that where you lit or where the engines collided?

A. That is where I lit and the engines collided.

3936 Q. Now when you say fifty or seventy-five, you seem to be certain?

A. Well, I don't know the exact distance.

3937 Q. That would be maybe 150 to 200 feet if your guess is right, three feet in a yard?

A. Yes.

3938 Q. It may have been only 25 yards or it may have been a hundred yards; are you certain about the distance?

A. Well it was between fifty and seventy-five yards somewhere around there.

473 3939 Q. Now Judge Holmes asked you about this switch engine in the yards; you knew that Lincoln had a switch engine, but where it was, you did not know?

A. No sir.

3940 Q. Had you seen it that day?

A. No sir.

3941 Q. Did you have any idea where it was?

A. No sir.

3942 Q. Judge Holmes asked you whether you sat on the right side of the engine going north, or the place where Mr. Wright was, whether you could see ahead; now I will ask you this question: Is it or is it not a fact that sitting on the right side, in the engineer's place, going north, and looking out of your cab, isn't the curve so sharp that the embankment projects in the way so you can't see very far?

A. Well I don't know how far you can see there.

3943 Q. Do you know to what extent the embankment obstructs the view of the engineer on the right side?

A. No sir.

3944 Q. Do you know how the pillars I call them, or the piling you call them, obstructs the view of the engineer still south of the viaduct?

A. No sir.

3945 Q. You don't know?

A. No sir.

3946 Q. Do you know what kind of day it was, whether clear or cloudy or otherwise?

A. I don't remember.

3947 Q. Have you run engines or trains through there since Mr. Wright was killed and since the semaphore was put in the curve?

474 Objected to as not proper redirect examination, immaterial, irrelevant and incompetent.

G. W. Berge directs the records to show that he overlooked this part, and that it is not proper redirect examination, but asks leave of the Court to now further ask a few questions in chief. Sustained. Exception.

3948 Q. Have you observed the operations of that semaphore in there?

Objected to as not proper redirect examination, immaterial, irrelevant and incompetent. Sustained. Exception.

3949 Q. Now, Mr. Witness, if you are going north, just as you were when Mr. Wright was killed, and if there is a train on the track, coming from the north southward, will the semaphore that is now there, indicate that there is a train on the track?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

3950 Q. State whether that semaphore is north or south of the viaduct?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

3951 Q. Now speaking of the one north of the viaduct, how far north of the viaduct would you say it is?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

3952 Q. It is out before you get past the curve?

A. Yes.

3953 Q. Can you see the semaphore from the viaduct, state if you do?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

3954 Q. But you say that when you are going northward, if there is a train coming from the north going south, just as this switch engine 1220 was that day, this semaphore now tells you if there is a train on the track?

475 Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case, and not proper rebuttal. Sustained. Exception.

3955 Q. Is that what a semaphore is for?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case, and no foundation laid. Sustained. Exception.

3956 Q. Do you know when that was placed there?

Objected to as immaterial, irrelevant, and not within the issues of this case. Sustained. Exception.

3957 Q. Well, was it after or before Mr. Wright was killed?

Objected to as immaterial, irrelevant and not within the issues of this case. Sustained. Exception.

Recross-examination by Mr. Holmes:

3958 Q. You knew at the time you went through, on the day of this accident, that there wasn't any semaphore there?

A. Yes sir.

3959 Q. You had known that for how long?

A. Ever since I had been on the road, learned the road through there.

3960 Q. Never had been a semaphore there, never a flagman stationed there to your knowledge?

A. Not that I know of.

3961 Q. Mr. McLane, handing you Exhibit "A" as identified by the Stenographer, I will ask you if that is your signature attached to the third page?

A. Yes sir, that is mine.

3962 Q. Was this paper signed at the date it bears?

A. I don't know.

3963 Q. You don't remember?

A. No.

3964 Q. Do you remember how long it was after the accident you signed?

476 A. No I don't remember.

3965 Q. You don't remember that?

A. No.

3966 Q. At the time you did sign this paper marked Exhibit "A", you were familiar with the situation of this accident, were you not, more so than you are now?

Objected to for the reason the question calls for testimony about the time he has alleged to have signed certain exhibit, and which is first produced now on cross-examination, and objected to because it is not proper cross-examination, incompetent, immaterial and irrelevant, and no proper sufficient foundation laid, self serving, calling for an opinion and conclusion of the witness, not a statement of any facts or any conversation with anybody. Overruled. Exception.

A. Yes sir.

3967 Q. Then any statement, Mr. McLane, that you might have made as to the speed of your engine at that time, was fresher in your memory was it not?

Objected to as not proper cross-examination, incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness, no foundation laid, and not showing under what circumstances or when and how he signed the alleged statement that the Counsel refers to. Overruled. Exception.

A. Yes sir.

3968 Q. Then, Mr. Lane, if you made a statement, saying that the speed of your engine was ten miles an hour and you testified at the Coroner's inquest, that the speed of your engine was ten miles an hour, at the time of the accident, that was correct wasn't it?

Objected to for the reason that it is not proper cross-examination, calling for an opinion and conclusion of the witness, not a statement of any fact or any conversation, no foundation laid, and not shown under what circumstances and surroundings, he made the alleged statement referred to. Sustained. Exception.

3969 Q. When you testified before the inquest, and when you signed this paper that has been identified as Exhibit "A", you were giving the truth of the transaction as best you could, were you not?

477 Objected to the question as not proper cross-examination in so far as any alleged statement; incompetent, irrelevant and immaterial, no proper sufficient foundation laid, calling for an opinion and conclusion of the witness and not a statement of any fact. Overruled. Exception.

A. Yes sir.

3970 Q. Now, Mr. McLane, having refreshed your memory from the testimony taken at the Coroner's inquest, and of the statement signed by you, and known in this case now as Exhibit "A", I wish you would give me your best judgment as to the speed of your engine 1486 at the time of this accident?

A. Well I don't remember now.

3971 Q. You haven't any judgment now as to the speed?

A. I don't remember.

3972 Q. Don't remember what?

A. How fast we were going.

3973 Q. I asked you what your best judgment was.

A. Well I haven't now, I don't remember that far back, I give it once, and I can't recall now.

3974 Q. At the time you testified at the inquest, and at the time you signed this Exhibit marked "A"?

A. It was.

3975 Q. Why did you testify before the inquest, that the speed of that engine was ten miles an hour, the speed of the engine just before the accident?

Objected to as not proper cross-examination, and he hasn't stated that he did so testify, all that he has done is that Counsel has said to him that he shall testify; and incompetent, irrelevant and immaterial. Sustained. Exception.

3976 Q. Why did you sign this statement, Mr. McLane, wherein you said the speed of that engine was ten miles an hour at the time of the accident?

Objected to as not proper cross-examination, calling for no statement of any facts, calling for no conversation, with anyone; but an opinion and conclusion of the witness, based not upon what  
478 the witness has testified, but what Counsel says he has testified to. Sustained. Exception.

3977 Q. Because you then thought that was true?

Objected to as not proper cross-examination, incompetent, irrelevant and immaterial, no proper foundation laid. Sustained. Exception.

Redirect examination by G. W. Berge:

G. W. Berge, Attorney for Plaintiff, desires that the records show that Counsel for plaintiffs now demands of Attorney for Defendant to permit him to make an inspection of this alleged Exhibit that he has cross-examined witness about.

E. P. Holmes, Counsel for defendant, railroad, desires the records to show that no demands were necessary at all, Mr. Berge, Counsel for plaintiff, was perfectly welcomed to examine Exhibit "A", and which the witness testified was made over his signature.

3978 Q. Mr. Witness, Mr. McLane, I hand you Exhibit "A" and will ask you to examine this signature, and I will ask you to state whether that is in your hand writing?

A. I am almost sure it is.

3979 Q. How about the body of the instrument, is that in your hand writing?

A. No sir.

3980 Q. Where were you when you signed that?

A. In Lincoln.

3981 Q. Where, in whose office?

A. I don't know whose office it was.

3982 Q. Was Judge Holmes present?

A. No.

3983 Q. Mr. De Lacy present?

479 A. No.

3984 Q. Down in the depot or up town?

A. Down town in some store.

3985 Q. Well, who was there and asked you to sign it?

A. Rock Island claim agent.

3986 Q. What was his name?

A. I don't recollect what his name was.

3987 Q. The gentleman over here? (Attorney indicating.)

A. No, I don't think it was.

3988 Q. W. E. Goodno, do you know him?

A. No, I don't know.

3989 Q. Did he have this statement all written out before he presented it to you?

A. No sir.

3990 Q. Where was it written out?

A. Written out in my presence.

3991 Q. Well wasn't it made up from what they said, evidence at the Coroner's inquest?

A. I don't think it was, I don't remember.

3992 Q. You told him and he wrote it out?

A. Yes sir, he asked me.

3993 Q. Then you signed it?

A. Yes sir.

3994 Q. And can you read that, this statement, that you signed, can you read it all?

A. I can read most of it.

3995 Q. Did you on that day before you signed it, read that thing clear through?

A. I don't remember whether I read it or not.

3996 Q. Will you swear that you read it?

A. No, I won't say either way, whether I read it or didn't.

3997 Q. That was the same day Mr. Wright was killed?

480 A. I don't know that.

3998 Q. When was it you signed this statement with respect to the time he was killed?

A. I don't know what day.

3999 Q. Wasn't it the same day?

A. I don't know.

4000 Q. Well do you say it was or wasn't?

A. I don't know what day.

281

4001 Q. The day he was killed, you were a good deal worried about it?

A. Not more worried than any other time.

4002 Q. When was it that you signed this statement, was it before the Coroner's inquest or afterwards?

A. I don't know.

4003 Q. You don't know.

A. I don't remember.

4004 Q. And you don't remember in what store you were?

A. No sir.

4005 Q. At the time you signed it?

A. No sir.

Recross-examination by Mr. Holmes

4006 Q. I will ask you to please read this statement marked Exhibit "A" and state whether there is any facts stated therein that are not true?

A. "I was fireman with Engineer Wright time engine 1486, extra east collided with switch in cut, (don't know that word) Lincoln."

4007 Q. (Asked by Mr. DeLacy, one of the Attorneys for Defendant) State if any facts in there is not true?

A. "Have been firing on the Rock Island for the past eighteen months at Fairbury. Engineer got time on No. 18 and 97 and running orders. Wherever he got orders he gave them to me to read. We got two 19 orders somewhere between Fairbury and Lincoln, one received at Hallam, giving us more time on 97 and 18, at Lincoln, we got meet order with 97 at South Bend and order saying that train 14 would run four hours and some minutes late, and we had plenty of time to go to Havelock. We left Lincoln, don't know what time as haven't any watch, stopped at Missouri Pacific crossing east of town, whistled and started on east, and just east of the Overhead bridge at Holdredge Street, two hundred feet east, we discovered switch engine, Wright seeing it first and shouted "for God's sake jump" I jumped off our engine and at that time I judge was running ten miles per hour. Did not notice how close we were to switch engine when I got off engine. Engineer Wright was caught between cab and tank, caused by tank sliding on the base, and the only thing he said to me was "Get me out of here." At the Hospital he asked where all that water come from. The tank was leaking and water ran out and on to him where he was fast between engine cab and tank. My side window was opened and front one closed. I don't know what position Engineer Wright's window was in. My front window was covered with frost so I could not see out and to look forward I used side window. Don't know whether or not Engineer's front window was covered with frost, but presumed it was as other windows in the cab were frosted."

4008 Q. That is all?

A. Yes sir.

4009 Q. You don't understand my question. (Reporter asked to read question again: State if any facts in there is not true?)

A. No, there is not.

4010 Q. Then, Mr. McLane, having read this statement in the presence of the stenographer, is there any statement there now that you desire to change?

482 A. No sir.

(It being Twelve o'clock, the taking of depositions was adjourned until One o'clock.)

G. W. Berge: Now I ask counsel for the Railroad to attach to the deposition of the witness, the original statement, "Exhibit A" which he has cross examined the witness about, and which he has had the witness read into the record, and as a part of the record, and for the reason that he has read it into the depositions of the witness, I want him to attach it to the deposition of the witness.

E. P. Holmes: Counsel now produces the original statement and is willing that the same should be attached to the deposition taken by the plaintiff in this case, and to which no objection will be made.

I will produce the original statement.

ERNEST E. McLANE."

(Copy of Exhibit A, attached to deposition:)

"LINCOLN, NEB., 12/10/09.

Rock Island Lines.

*Statement of Witness to Accident.*

Instructions.—Be careful to get complete statement from each witness, asking also for names of other witnesses. If possible, have statement signed and attested. Blank paper may be used for additional pages.

Accident to Otto W. Wright, which occurred on or about Dec. 8th, 1910, at or near Lincoln, Neb.

My name is E. E. McLane, address 200 8th St., Fairbury, occupation Fireman, employed by C. R. I. & P. Ry.

I was fireman with Engr. Wright time Eng. 1486 Extra East collided with switch in cut east of Lincoln. Have been fireman on the Rock Island the past 18 months. At Fairbury Engr. got time on No. 18 & 97 and running orders. Where ever he got orders he gave them to me to read. We got two different 19 orders somewhere between Fairbury & Lincoln,—one occurred at Hallam, giving us more time on either 97 or 18. At Lincoln we got meet order  
483 with 97 at South Bend and order saying train 14 would run 4 hours & some minutes late and we had plenty of time to go to Havelock. We left Lincoln. Don't — what time as I haven't any watch. Stopped at Mo. Pac. line East of town & whistled & started on East & just East of Over-head Bridg- at Holdrege—probably 200 ft. East, we discovered switch Engr.—Engr. Wright seeing it first, & shouted for God's Sake jump. I jumped off & Our Engine

at that time I should judge was running 10 miles pr. hour. Did not notice how close we were to switch engine when I got off. Engr. Wright was caught between Cab & tank Caused by tank slipping on the base and the only thing he said to me was—"Get me out of here." At the hospital he asked where all that water came from. The tank was leaking & water ran out & onto him while he was fast between Engine & tank. My side window was open & front one closed. Don't know what position Engr. Wright's window- were in. My front window was covered with frost so that I could not see out & to look forward I used side window, Don't know whether or not Engr. front window was covered with frost but presume it was as other windows in cab were frosty.

E. E. McLANE. Dec. 10/09."

Witness:

W. E. GOODNOW."

484 JOHN S. STEALMAN, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for plaintiff:

4011 Q. Give us your full name, Doctor?

A. John F. Stealman.

4012 Q. Do you hold any official position in the city now?

A. City physician.

4013 Q. How long have you been?

A. Almost two years.

4014 Q. Were you city physician December 8th, 1909?

A. Yes sir.

4015 Q. Are you a regular practicing physician?

A. Yes sir.

4016 Q. How long have you been?

A. It will be eight years, the 1st of May.

4017 Q. Regular graduate?

A. Yes sir.

4018 Q. Licensed to practice?

A. Yes sir.

4019 Q. You have practiced during that whole time in the city?

A. Yes sir.

4020 Q. Now December 8th, 1909, Doctor, do you remember of being called in attendance on an injured man down at the Rock Island yards?

A. I remember of being called, but I could not state the date.

4021 Q. Well, you were called?

A. Yes sir.

4022 Q. And where did you first see the injured man?

A. He was on the engine.

485 4023 Q. On the engine?

A. Yes sir.

4024 Q. You may state whether you were there when he was taken off?

A. I was.

4025 Q. How did you get out there?

A. I was at 27th and Holdrege and walked across to the viaduct.

4026 Q. You were at 27th and Holdrege?

A. Yes sir.

4027 Q. How did you know of the collision down there?

A. I was notified from the police station.

4028 Q. You were sort of in touch with the city headquarters?

A. Yes, they know where I am all the time.

4029 Q. That is, as a rule, on account of needing you?

A. Yes sir.

4030 Q. How long, doctor, before he was taken out did you get there?

A. I don't know exactly how long, probably 20 minutes.

4031 Q. And do you know how they took him out?

A. They used some jacks and forced the tank back away from the engine.

4032 Q. And did you help take him to the ambulance or automobile, whatever it was?

A. Yes sir.

4033 Q. Did you accompany him to the hospital?

A. Yes sir.

4034 Q. What hospital?

A. St. Elizabeth's.

4035 Q. Where is that in the city?

A. On 11th and South street.

486 4036 Q. What time of the day would you say it was when you got him out?

A. Well, I don't know, it was shortly after the lunch hour, that I was called, but I would not know, it was probably a little after two o'clock.

4037 Q. What other doctor accompanied you or was in attendance upon Mr. Wright, if anybody?

A. Why, Dr. Mitchell.

4038 Q. Mitchell or Graham?

A. I did not see Dr. Graham have anything to do with the case.

4039 Q. Dr. Mitchell was there?

A. He was not at the place of the accident but as we were going to the hospital we met Dr. Mitchell in the ambulance going out there, and he got out of the ambulance and went to the hospital with us in the automobile.

4040 Q. Dr. Mitchell, the Company's physician? And did you transfer Mr. Wright to the ambulance?

A. No sir.

4041 Q. State whether you took Mr. Wright to the hospital in the automobile?

A. We took him in the automobile.

4042 Q. Could he sit up?

A. No sir.

4043 Q. Were you in the seat with him—and who else was in the seat with you?

A. No one, one of the men that was there, one of the railroad

men was in the back of the automobile. Now, I don't remember whether he was sitting in the seat and supporting Mr. Wright or whether it was me that was doing that.

487 4044 Q. Whether what?

A. Whether I did, I don't know which it was.

4045 Q. Was it a double seated automobile?

A. Yes, a five passenger car, I think.

4046 Q. Could he sit up himself, Mr. Wright?

A. No sir.

4047 Q. Tell the jury to what extent you remained with Mr. Wright the rest of that day?

A. I just stayed until he was put in bed, was all. Dr. Mitchell, the Company physician was to take care of the case so I left.

4048 Q. Did you see Mr. Wright after that?

A. Not after he was put in bed.

4049 Q. At no time.

A. No sir.

4050 Q. Did you help examine his injuries?

A. No sir.

4051 Q. Did you examine his injuries at any time?

A. No sir.

4052 Q. Did he walk into the hospital?

A. No sir, we carried him in.

4053 Q. Carried him in. I thought it was Dr. Graham,—Dr. Graham is sick now?

A. Yes sir, I understand he is.

4054 Q. If Dr. Graham is sick,—I understood Dr. Graham was with you and he is sick,—I didn't know it was Dr. Mitchell?

A. No, I did not see Dr. Graham on the case at all.

4055 Q. After you had left the hospital there that afternoon, you did not go back there at all?

488 A. No sir.

4056 Q. You understood Dr. Mitchell had charge of it?

A. Yes sir.

4057 Q. You had never talked with me about this?

A. No sir.

4058 Q. I supposed you had charge of him until he died, did Mr. Wright do much talking?

A. I don't remember of him having said anything.

Witness excused.

489 WILLIAM CHARLES CAVANAUGH, being recalled on behalf of the plaintiff, testified as follows.

Examined by Mr. Berge for the plaintiff:

4059 Q. You are the same Mr. Cavanaugh that was on the witness stand in this case heretofore?

A. Yes sir.

4060 Q. The general train dispatcher at Fairbury of the defendant road?

A. Chief dispatcher.

4061 Q. When you were on the witness stand before you did not have with you the records of what you called "the students' run," of the deceased, Mr. Wright, have you got that now?

A. Yes sir.

4062 Q. I wish you would produce it?

A. (Witness produces records.) You had the students' trip here, I believe.

4063 Q. Did you take the students' paper home with you?

A. No sir.

4064 Q. That students' trip here, was one trip?

A. One round trip, from Fairbury to Council Bluffs.

4065 Q. On what day?

A. On September 15th and on No. 90 was the first one.

4066 Q. That was going towards Omaha?

A. Fairbury to Council Bluffs.

4067 Q. And returned when?

A. On September 18th, on No. 97 Council Bluffs to Fairbury.

4068 Q. Now, then from Fairbury to Council Bluffs I wish you would start at Fairbury and give us the time of the day until he got up there?

A. On September 15th on No. 90 engineer Mergen, that  
490 is the man he was with, left Fairbury at 6:20 P. M., arrived at Lincoln at 8:25 P. M., left Lincoln at 8:55 P. M. Do you wish any farther than that? Passed Alvo at 9:48 P. M. and arrived at Council Bluffs at 1 A. M. September 16th.

4069 Q. When you say P. M., that is in the afternoon?

A. Afternoon.

4070 Q. And that was on what day?

A. September 15th, he left or passed through Lincoln arriving at Council Bluffs the morning of the 16th.

4071 Q. And he left Lincoln, when?

A. At 8:55 P. M.

4072 Q. That is 5 minutes of 9 o'clock?

A. Yes sir.

4073 Q. Now, on his return what does it show?

A. September 18th.

4074 Q. When was the other September? what?

A. September 15th. September 18th, on No. 97 from Council Bluffs to Fairbury, engineer Costello. Left Council Bluffs at 8 o'clock A. M. September 18th arrived at Lincoln at 12:20 P. M., left Lincoln at 1:10 P. M. and arrived at Fairbury at 4:05 P. M.

4075 Q. That is on the 19th?

A. That is on the 18th, September 18th.

4076 Q. How do you know that that was his first trip over the road?

A. By his student paper.

4077 Q. By a student's paper, associating with him the same engineer?

A. Yes sir.

4078 Q. Is there any other way that you have of telling it?

A. Not that I know of, no sir; not as far as my records are concerned.

491 4079 Q. These that you are reading from, that is what do you call it?

A. Telegraph movement of trains, commonly known as the "train sheet."

4080 Q. And the trip that you have read from that is the sheet itself, don't associate Mr. Wright with that trip, does it?

A. No sir. The student's paper and the signature of the engineers that were on the trains.

4081 Q. Yes; the student's paper gives the engineer of that trip, but the sheet that y-u read from don't give Mr. Wright's name?

A. No sir.

Cross-examination.

Examined by Mr. Holmes for defendant:

4082 Q. Mr. Wright was in Lincoln before this trip; he says on the student's paper he is not in the service of the Company?

A. No sir.

4083 Q. Had he been in the service of the Company that would have appeared on the train sheet?

A. Yes sir, that is where the time keeper checks up.

4084 Q. At the time you left the witness stand before you said you would produce some train sheets showing other runs, other trips other than what you had given the jury? Can you do that?

A. Yes, there are three I had left out before.

4085 Q. Will you refer to your train sheet and tell us what those trips were, I mean going through the Lincoln yards?

492 A. Do you remember the exact date we left off? I have September 13th, 14th, 15th, 18, that was the student's trip, the 15th and 18th.

4086 Q. Have you any more?

A. The 13th and 14th; October 1st, November 14th, and November 16th was the dates that we were short, was it not?

4087 Q. November 14, 15 and 16?

A. October 1st, November 14 and November 16.

4088 Q. Yes. Now give us those trips?

A. On October 1st, 1909, engineer Wright on section No. 90 left Fairbury at 2 o'clock P. M., arrived at Lincoln at 6:20 P. M.; departed at 6:45 P. M. and arrived at Council Bluffs at 10:30 P. M.

(By Mr. Berge:)

4089 Q. That is October 1?

A. October 1st.

4090 Q. Now, the next day?

A. October 14th, 1909; extra 1727 west, left Council Bluffs at 1:50 P. M.; arrived at Lincoln at 10:10 P. M.; departed at 11:50 P. M., arrived at Fairbury 3:10 A. M. November 15.

4091 Q. The next day?

A. November 16t-, on No. 86 engineer Wright, left Fairbury at

9:30 A. M.; arrived at Lincoln at 12:50 P. M., departed at 4:15 P. M., arrived at Council Bluffs at 10:40 P. M., on No. 86, local freight train.

4092 Q. Now, Mr. Cavanaugh, is that all of the trips that you have any record of?

A. That is all, yes sir.

Redirect examination.

493 Examined by Mr. Berge for plaintiff:

4093 Q. Had you Mr. Wright's name given in full?

A. Not in full. We used the last name.

4094 Q. Mr. Wright?

A. Yes, unless there is more than one of the Division.

4095 Q. Are you sure there was no more than one Wright?

A. Yes sir.

4096 Q. How do you know?

A. Because I have a list of all the engineers, also all the brakemen and conductors.

4097 Q. He was the only Wright on that Division?

A. Yes, as an engineer.

4098 Q. There were other Wrights not engineers?

A. There might have been other Wrights that were in the employ that was not an engineer, that is the only Wright that we had that was an engineer on the Division. I have seen our list of all the engineers, conductors and brakemen in the office with their full initials and names.

Witness excused.

494 L. H. Hinitt, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

L. H. HINITT.

Direct examination by G. W. Berge:

4099 Q. Give us your full name.

A. Lon H. Hinitt.

4100 Q. L. H.

A. Lon H.

4101 Q. You were sworn this morning?

A. I was.

4102 Q. What is your occupation now, Mr. Hinitt?

A. Brakeman for the C., R. I. & P.

4103 Q. H-i-n-i-t-t, is that the way you spell your name?

A. Yes sir.

4104 Q. Are you brakeman for the defendant road now?

A. Yes sir.

4105 Q. How long have you been employed by the defendant?

A. About three years during the last time of service.

4106 Q. And during the three years were you a brakeman all the time?

A. Yes sir.

4107 Q. And were you employed continuously?

A. Yes sir.

4108 Q. You said three years this last time; were you employed once before?

A. Yes sir.

4109 Q. In what capacity?

A. The same, brakeman.

4110 Q. How long before?

A. About two years and a half.

495 4111 Q. Where do you live now?

A. Fairbury, Nebraska.

4112 Q. Were you living in Fairbury, Nebraska, on the 8th and 9th of December, 1909?

A. Yes sir.

4113 Q. Were you brakeman then for the defendant railroad?

A. Yes sir.

4114 Q. Do you remember what day it was that Mr. Wright was killed in the Lincoln yards, what day of the month?

A. No sir, I can't recall the day at this time.

4115 Q. Do you remember the time and circumstances?

A. Yes sir.

4116 Q. Did you accompany Mr. Wright on that trip?

A. At the time he was killed?

4117 Q. Yes.

A. Yes sir.

4118 Q. And where did you start?

A. Fairbury, Nebraska, from Fairbury.

4119 Q. And did you know where your destination was?

A. Yes sir.

4120 Q. Where?

A. Council Bluffs, Iowa.

4121 Q. What kind of a train were you running that day; did you have a train or just an engine?

A. Do you mean to specify the class of train?

4122 Q. No, any cars?

A. Light engine.

4123 Q. Did you have anything but an engine and coal car?

A. No sir, light engine; tank and engine is a light engine.

4124 Q. The engine takes in coal car and tank?

A. Yes sir.

4125 Q. What were you that day, brakeman, flagman or what?

A. I was called flagman, it is all the same in our terms.

496 4126 Q. That is flagman and brakeman is same?

A. Yes sir.

4127 Q. Then you were really a brakeman, too?

A. Yes sir.

4128 Q. Do you know when you left Fairbury that day?

A. I couldn't say exactly the time without looking at the record?

4129 Q. Were you acquainted with Wright at that time?

A. Personally acquainted with him, yes.

4130 Q. How long had you known him?

A. Oh, I should judge a month, something to that effect, right along that time. Don't remember exactly, just met him as being a man working here with us.

4131 Q. From appearances, how old a man would you say he was?

A. I wouldn't attempt to say because I am not a judge of age.

4132 Q. What was the number of your engine?

A. I couldn't tell exactly without going back.

4133 Q. 1486?

A. Yes sir.

4134 Q. As a brakeman or flagman, did you know anything about the orders of the train or engine?

A. Yes sir.

4135 Q. The rules require you to know them?

A. Yes sir.

4136 Q. Did you know what your orders were when you left Fairbury that day?

A. Yes sir.

4137 Q. What were they?

As a part of that question, I don't ask you to give the contents of any order, but from your own knowledge do you know what the order was?

497 A. In other words, I understood all orders that we got leaving Fairbury that time.

4138 Q. Did you receive any orders along the way before you got to Lincoln on that trip?

A. Yes sir.

4139 Q. Where?

A. I wouldn't like to state because I couldn't state without probably contradicting my other statement; I don't know exactly where; as just a guess, not Jansen; I would say Hallam, but I am pretty sure that we received 19 order.

4140 Q. Received 19 order, is that the number of it?

A. Yes that is the class of order it is, it was 19 train order.

4141 Q. That was the number of the order?

A. It was not the train order number, but number 19 form.

4142 Q. Did you receive an order at Lincoln?

A. Yes sir.

4143 Q. Have you those orders, any of them?

A. No sir.

4144 Q. You may state how you are supposed to know the orders, do you get copies or read the Engineer's?

A. Every train is furnished with two copies, one for the engineer and one for the conductor, and in running a light engine, they are furnished the same way, but in the absence of the conductor, the brakeman receives the other copy.

4145 Q. Now you received an order of course in Fairbury, when you started?

A. Yes sir.

4146 Q. Where is that order?

A. Where is it?

4147 Q. Yes, you get a copy of the Dispatcher and Operator?

A. You mean my copy?

498 4148 Q. Yes sir.

A. I haven't the least idea, I haven't retained it.

4149 Q. Did you retain the order you received at Hallem, if you received one?

A. No sir, I did for a while but it was misplaced.

4150 Q. Have you hunted for them?

A. Yes, I looked for them but I couldn't find them; well, I found them but didn't save them for they wer-n't complete. I make a business as soon as an order is executed or fulfilled to remove them from the bunch I have and throw them away.

4151 Q. Did you receive an order from Lincoln?

A. Yes sir.

4152 Q. Have you got that order?

A. No sir.

4153 Q. Where is it?

A. As I say, I hunted them up and didn't have them all complete and threw them all away.

4154 Q. You destroyed them all?

A. Yes sir.

4155 Q. How did you *become* to destroy them?

A. They weren't complete and I didn't think they would want to be used.

4156 Q. Did anybody ask you to look them up with respect to this particular trip?

A. They did not.

4157 Q. How did you come to look them up and find them incomplete?

A. I knew I had part in my pocket; most of them had not been fully executed, and were in my pocket at the time of the accident, and were there when I came back to Fairbury, and then when we were called to Lincoln before the Coroner's jury I went back to see if I had them all to produce in case they asked me, and I didn't have, and so I just let go of them all.

499 4158 Q. You let go of them; didn't you turn them over to some official of the road?

A. No sir.

4159 Q. You are sure of that?

A. Yes sir, I am positive.

4160 Q. Didn't you produce part of them at the Coroner's inquest?

A. The copies that were produced, they were taken from the engineer's clothing.

4161 Q. Mr. Hinitt, of course, the railroad has copies of every order that is given to the trainmen, haven't they?

A. I don't understand.

4162 Q. The railroad has a copy of all those orders that were given you and the engineer?

A. I presume they have, yes sir.

4163 Q. What do you know about the custom?

A. I don't know as to the record or copy, I am not able to know; I have never seen the book and couldn't say whether it did or not; out of my line.

4164 Q. Well, suppose an order was given you here at Fairbury, the book here would contain a copy of that order, wouldn't it?

A. I say I don't know, just a supposition, I don't know.

4165 Q. Suppose an order was given you at Hallam, would the book they kept there have a copy?

A. No sir.

4166 Q. If an order was given you at Hallam, where would it be entered?

A. Entered at Fairbury, Chief Dispatcher's office.

4167 Q. If an order was given you at Lincoln, where would it be entered?

A. Fairbury, Chief Dispatcher's office.

4168 Q. And simply deliver you one through the operator?

A. Yes sir.

500 4169 Q. The Chief Dispatcher resides here does he?

A. Yes sir.

4170 Q. What is his name?

A. W. C. Cavanagh.

4171 Q. What was his name December, 1909?

A. W. C. Cavanagh, if I am not mistaken; I wouldn't say to a certainty.

4172 Q. And where does he have his office?

A. He has an office in the Rock Island yards.

4173 Q. In Fairbury?

A. In Fairbury.

4174 Q. State whether all orders between Fairbury and Council Bluffs would operate from the train dispatcher's office in Fairbury?

A. All train orders, yes sir.

4175 Q. And if orders were delivered on the way, the operators where they are delivered wouldn't probably have any record in any book as to the contents in it?

A. In regard to a book, no they wouldn't.

4176 Q. Would they have any other record?

A. Yes.

4177 Q. Have they a copy of the message itself?

A. Yes sir.

4178 Q. Do you know what the order was you received at Lincoln?

A. It was a meet order with No. 97, a second-class train, at South Bend?

4179 Q. That is, you mean when you left Lincoln, you had the road until you struck South Bend?

A. No, it doesn't mean that.

4180 Q. What does it mean?

A. I mean so far as that particular train was concerned?

4181 Q. What particular train?

A. No. 97.

501 4182 Q. Well, when you get an order what to do, don't you have the track until you are given the first train that you meet?

A. No sir.

4183 Q. Well, when you left Lincoln, then, how did you know whether you would meet any train along the way?

A. We do run according to time cards, time orders or in relation to trains running late?

4184 Q. Then if you have no orders you do have a time card?

A. Yes sir.

4185 Q. And you run according to that?

A. Yes sir.

4186 Q. But if a train is late you no doubt must have an order?

A. If we proceed on the time that is given on the time cards?

4187 Q. Now, on this particular day, if an order was given you at Lincoln, you got a copy of it?

A. Yes sir.

4188 Q. When you left Lincoln, had you seen any switch engine in the yard?

A. No sir.

4189 Q. Did you know where it was?

A. No sir.

4190 Q. Have you ever been over the road before?

A. Yes sir.

4191 Q. State generally how frequently?

A. That's a pretty hard proposition to do.

4192 Q. A great number of times or few

A. Oh, yes, practically, you might say, one way over the division every day, one way or the other, might be east, might be west.

4193 Q. After you left Lincoln until the collision do you now remember where in the engine you rode?

A. Yes sir.

502 4194 Q. Where?

A. On the fireman's box seat.

4195 Q. What were you doing there?

A. I was riding there, only place particularly for a man to ride.

4196 Q. What?

A. Piloting or flagging a light engine, there is no other place to ride.

4197 Q. What were your duties as brakeman or flagman that day

A. To protect with a flag if it became necessary.

4198 Q. Anything else?

A. Nothing more than the general duties of a brakeman, comes to entering or leaving a main line, opening and closing all switches?

4199. Did you see any switch engine out south as you come in?

A. No sir.

4200 Q. About the registration when you struck Lincoln, you had to register when — got in?

A. Yes sir.

4201 Q. And also when you left?

A. Yes sir.

4202 Q. Who did that?

A. I did on the instructions of the Engineer?

4203 Q. Do you know why you happened to do that on that day, was it for any special reason?

A. Why I did that?

4204 Q. Yes.

A. For the simple reason, he had no lead pencil; he stood right over me, and I registered for him.

4205 Q. And that register will appear in your handwriting in that way?

A. Yes sir.

503 4206 Q. While he was right there?

A. Yes sir.

4207 Q. And you say you were on what side of the engine?

A. On the left hand side.

4208 Q. Do you remember the place where the accident occurred?

A. Yes sir.

4209 Q. Which side of the viaduct, north or south?

A. As I remember right, it was almost east, yes north.

4210 Q. Do you remember how far?

A. Oh, I didn't notice enough to make any definite statement, but I should judge it would be about six or eight car lengths, maybe less?

4211 Q. Did you see the switch engine before you jumped?

A. No sir.

4212 Q. What made you jump?

A. Notice from the engineer.

4213 Q. What notice did he give you?

A. He said "For God's sake, jump."

4214 Q. Did he say "Boys, for God's sake, jump?"

A. Well I couldn't be positive as to that.

4215 Q. Where was he when he called that out?

A. Well that is a funny question; he was on his side of the cab, on the right side.

4216 Q. Anything else that made you jump that took place at that time, besides his calling out?

A. Nothing more than the man's action in regard to handling his engine?

4217 Q. Well, what was that?

A. Thrown in the emergency, and put it in back motion.

4218 Q. What does all that mean, what will it do?

A. Charging the brake with their utmost capacity and placing the engine from forward motion in back motion.

4219 Q. That is all the braking that can be done is thrown on?

504 A. Yes sir.

4220 Q. And the steam is really applied backward?

A. Yes sir.

4221 Q. When that is done is it possible to do anything more to stop the engine?

A. No sir.

4222 Q. You may state then, whether Mr. Wright did everything that could be done to stop the engine?

A. To the best of my knowledge he did.

4223 Q. Now, how did you get out the engine?

A. Through the cab window.

4224 Q. On which side?

A. Left side.

4225 Q. How big is that cab window?

A. I don't know exactly the dimensions, I suppose about three and one-half by three.

4226 Q. Three and one-half length wise and three up and down?

A. Yes, something on that dimension, I don't know, about that proportion.

4227 Q. Covered with glass?

A. A little one.

4228 Q. Did you open the little window?

A. Window was open.

4229 Q. How did you go out, head first or feet first?

A. Head first.

4230 Q. You must have lit on your head?

A. I did.

4231 Q. You may state whether you jumped immediately when Mr. Wright called to you?

A. I did.

4232 Q. You may state whether he reversed his engine about the same time he called out, before or after?

505 A. It was all taking place the same time.

4233 Q. And then the place where you fell, did you get up right away?

A. Yes sir.

4234 Q. And how far were you from your engine when it collided from the place where you fell?

A. Right by the side of it.

4235 Q. Had it passed the full length of the engine and coal car?

A. No sir.

4236 Q. How far did the engine run from the time the emergency brake was applied and Mr. Wright called out, until the place where you lit on the ground?

A. You mean from the time he spoke to me or hollered at us and the time I struck the ground, how far the engine advanced?

4237 Q. Yes sir.

A. In fact, I couldn't say, pretty hard to state. I don't know when I jumped which way I was going in relation to the movement of the train.

4238 Q. How did you jump out so far, straight out or sideways?

A. Frog fashion, grabbed the sill and dove out.

4239 Q. Frog fashion, you jumped out at right angles from the train?

A. Don't know, might have went that way or the other, couldn't state.

4240 Q. How far was it from the viaduct when you lit frog fashion?

A. Well let's see, about eight or nine car lengths.

4241 Q. And did you see the switch engine at any time before you heard the crash?

A. Well no, I saw when I was in the air was all, just as they were together.

4242 Q. When you went out, did you observe, Mr. McLane, where he was?

A. No sir, I did not.

4243 Q. Did you have a warning at all of any kind of the approach of the switch engine until you heard Mr. Wright call out to you and reversed the engine?

506 A. No sir.

4244 Q. You heard no whistle from the switch engine?

A. No sir.

4245 Q. No bell?

A. No sir.

4246 Q. And the thing that made you jump was Mr. Wright calling out and he reversing his engine?

A. Yes sir.

4247 Q. You knew that something was wrong?

A. Yes sir.

4248 Q. And if you saw the switch engine at all, it was as you were leaping out?

A. Yes sir.

4249 Q. The first time you did see it?

A. Yes sir.

4250 Q. And, you know how Mr. Wright was pinioned in there?

A. Yes sir.

4251 Q. You helped get him out?

A. Yes sir.

4252 Q. On which side of the engine?

A. Left side.

4253 Q. Same side you jumped out?

A. Same side, yes sir.

4254 Q. When you lit on the ground, did you see Mr. McLane out there on the ground?

A. Well, I hardly know whether I did or not, everybody was taking action. I didn't pay particular attention, I couldn't state whether I saw him or not, might have spoke to him.

4255 Q. You couldn't say where he lit with respect to where you lit, on either side of you?

A. No.

4256 Q. Have you set on that side in an engine before  
507 frequently?

A. Yes sir.

4257 Q. You may state, sitting on that side, whether, you sitting there and looking out ahead, how far ahead you can see on the track, just where you emerge from the viaduct on the other side?

A. That is sitting on the fireman's seat box, going through that cut, just as you leave the viaduct?

4258 Q. Yes.

A. It is impossible to see any distance around there.

4259 Q. The fact is you could hardly see the track only a few feet from the front of the engine?

A. From the place where I sat you couldn't see at all.

4260 Q. Why?

A. The condition of the track.

4261 Q. You mean the sharp curve?

A. Yes sir.

4262 Q. The curve swings which way?

A. To the right.

4263 Q. Or to the east?

A. Yes sir.

4264 Q. Have you ever sat on the other side, on the engineer's side?

A. Yes sir.

4265 Q. And as you sat on the other side, and as you emerged from under the viaduct have you observed the embankment that projects from the east, or how close the embankment is to the track, have you ever observed that?

A. Yes sir.

4266 Q. Have you observed how high it is?

A. Yes sir.

4267 Q. On the east side?

A. Yes sir.

4268 Q. State how high.

508 A. Well, with relation to feet and inches, I couldn't exactly state but at that particular place, it is higher. It obstructs the view from the cab window, you couldn't see across, parallel across.

4269 Q. I mean after you go out of the other side of the viaduct?

A. That is what I say.

4270 Q. The embankment, it's where the viaduct obstructs the view?

A. Yes sir, for just that short distance, right in that particular spot.

4271 Q. Right in that curve?

A. In that particular part of the curve, yes sir.

4272 Q. If you start at the north side of the viaduct immediately on the north side and run 200 feet, 250 feet or 300 feet north, the track swings to the right so far that you can't see the track ahead for the obstruction?

A. I don't really understand exactly what you mean.

4273 Q. I mean if you sit in the engineer's place on the engine, and looking down the track northward or northeast from the other side of the viaduct, just where you get out from under it, I want to know about that obstruction, the curve to the right, what it does to you?

A. It obstructs the view for any distance.

4274 Q. The embankment is higher than the train?

A. Than the cab window, yes sir.

4275 Q. At the viaduct immediately on the north side, isn't the embankment twice as high as an engine?

A. On the north side?

4276 Q. Yes, and on the east side?

A. On the north side, no sir, it is lower.

4277 Q. I mean on the north side of the viaduct.

A. That is the left hand side.

4278 Q. North immediately on the right hand side.

A. That is on the south side.

509 4279 Q. All right.

A. Yes it is.

4280 Q. Now on the left side, there is no ground there?

A. It isn't high there no.

4281 Q. Before the collision, and as you were leaping out of the engine, when you first saw the switch engine, up to that time did you have any idea where the switch engine was?

A. No sir.

4282 Q. The engine that you were on, how about noise, does it make much noise?

A. Not any more than the ordinary locomotive running light would.

4283 Q. It doesn't make as much noise as a train?

A. No sir.

4284 Q. Was your engine thrown off from the track?

A. No sir.

4285 Q. Was the other, the switch engine?

A. Yes sir.

4286 Q. Explain how the switch engine was after everything stopped striking, where it was?

A. Well it was on the track everything but was termed pony trucks.

4287 Q. The pony trucks, are the four small wheels in the front end of the engine?

A. Yes sir.

4288 Q. What about the cow catcher on your engine?

A. It was demolished entirely.

4289 Q. I will ask you about the viaduct, do you know upon what it rests immediately on each side of the track?

A. Yes sir.

4290 Q. On what?

A. Piling.

4291 Q. Piling?

510 A. Yes sir.

4292 Q. Those are large cedar posts?

A. Yes sir.

4293 Q. State whether they are close together, and a lot of them or only a few of them?

A. Well, I think there is practically only two sections that are of any length piling, center of the track.

4294 Q. You mean two sections running parallel with the track?

A. Yes, two rows of them.

4295 Q. State now as you go east, farther beyond the two rows whether there aren't three or four more rows, only they don't run clear down, the ground gets up higher?

A. Yes.

4296 Q. The ground goes up, and posts strike the ground?

A. Yes.

4297 Q. Have you any idea how many piles or posts there are in the row from south to north the width of the viaduct?

A. I couldn't say, but I think it is either five or six.

4298 Q. In each row?

A. Yes.

4299 Q. And they are quite large?

A. Yes sir.

4300 Q. About twelve inches in diameter or more?

A. Well, I am not versed in timber and wouldn't like to state.

4301 Q. Do you know how near those pilings are to the cab engine as you pass?

A. Now in regard to feet and inches, I couldn't say.

4302 Q. Would you estimate it four feet?

A. It would clear that much anyway.

4303 Q. Now as you were still on the south side of the viaduct, and approaching the viaduct, you may state whether a person  
511 can see much beyond the viaduct on account of the pilings?

A. From the south side?

4304 Q. Yes sir.

A. No, I don't think they would have any bearing from the south side, you could see just as far with them there as without them there.

4305 Q. Do you see farther east than the posts?

A. Just a slight distance.

4306 Q. The curve begins at the viaduct?

A. Just as near as you can think.

4307 Q. But immediately past the viaduct, it swings rather abruptly?

A. Yes sir.

4308 Q. Do you know what is meant by railroad men, when they speak of running under control?

A. Yes sir.

4309 Q. What is it?

A. Within the distance that you can see the road to be clear, or the track to be clear.

4310 Q. Are you experienced enough, familiar enough to know how soon trains can be stopped or engines running a definite speed?

A. Well that is a pretty hard matter, but I think as much as any one I could.

4311 Q. Well, of course, you can stop an engine quicker than a whole train?

A. Yes sir.

4312 Q. On account you don't have the weight of the whole train?

A. Yes sir.

4313 Q. You can stop a light engine quicker than a heavier one?

A. Well, I don't know as to regards to that, I am not versed in machinery, but I would judge that you could.

4314 Q. You take a light engine like this one on this particular day, and running at the rate of twenty miles an hour, how soon can it be stopped, running what distance?

512 Objected to as incompetent, irrelevant and immaterial no sufficient foundation being laid, and witness not having shown himself competent to answer the question propounded.

Sustained. Exception.

4315 Q. I thought, Mr. Hinitt, you said you could say as well as any one, something like that?

A. I said I could state whether he could stop running or not with safety, but with relation how far how many feet, a man could stop an engine, that would be asking too much of me, I wouldn't know.

4316 Q. Would you know when a man was running twenty miles an hour?

A. Yes sir.

4317 Q. How?

A. By practical experience.

4318 Q. Trains, in your practical experience are frequently stopped as quickly as they can possibly stop them?

A. That isn't done very often, what you might term an emergency stop.

4319 Q. Suppose a train or engine running fifteen miles an hour, at that speed, engine alone, and a man did everything he could to stop it at once, how far would it run before he got it stopped?

A. You are asking questions of me that I can't explain or answer for the simple reason I am not versed in the mechanical department. If you ask me about train or cars, I would answer you in this manner; that by knowing the condition of the brakes on those cars, by having inspected them before starting, I could come nearer telling you the way it could be handled.

4320 Q. Do I understand you to say then that you couldn't estimate the distance it would run, in the question I have given you, before it would stop?

513 A. I couldn't give you any idea that would be definite, because I am not versed in machinery of a light engine.

4321 Q. What is under control in one place might not be under control, what is so considered in another place, that is correct isn't it?

A. Yes.

4322 Q. Is there a fixed speed, that railroad men call under control?

A. No sir.

4323 Q. Then, whether or not any engine or train in any case is or is not under control, depends upon the whole situation and conditions surrounding the particular case?

A. Yes sir.

4324 Q. Were you in the yard limits when the collision took place?

A. Yes sir.

4325 Q. Were you running under control?

Objected to as incompetent, immaterial, irrevelant, calling for a conclusion of the witness and not for a fact. It is proper for the witness to state the speed at which that engine was going; to say whether or not it was under control is a conclusion and not a fact, and is not a proper foundation.

Sustained. Exception.

4326 Q. Were you doing anything up there in the flagman or in the fireman's cab?

A. Yes sir, sitting there ringing the bell was all.

4327 Q. You were ringing the bell?

A. Yes sir.

4328 Q. It was ringing at the time you were called to jump?

A. Yes sir, I was sitting there pulling on the string.

4329 Q. Were you there when Mr. Wright was finally taken out of the wreck?

A. Yes sir.

4330 Q. Was he living yet?

A. Yes sir.

4331 Q. Did you see him after he was taken away?

514 A. Yes sir.

4332 Q. Where?

A. At the St. Elizabeth's Hospital.

4333 Q. At what time in the day?

A. It was somewhere in the evening between I should judge six and eight o'clock, I couldn't specify exactly as to what time, somewhere in the evening, almost dark.

4334 Q. You were *you* able to talk to him?

A. I was able to talk to him but he wasn't able to respond.

4335 Q. Do you know when he died?

A. Nothing only hearsay.

4336 Q. Did you see him again after that time?

A. No sir.

4337 Q. As a part of your duty as a flagman, isn't it your duty to let engines in and out of passing track?

A. Yes sir.

4338 Q. Throwing switches?

A. Yes sir.

4339 Q. Protecting the rear or head end?

A. Yes sir.

4340 Q. And assist the engineer in general with his orders in getting over the road?

A. Yes sir, I will have to retaliate——

4341 Q. You mean retract don't you?

A. Yes sir, I want to retract on the last. In regard to assisting in the orders trainmen are not examined in regard to orders, he wouldn't be held responsible.

4342 Q. You mean by trainmen, flagmen and brakemen?

A. Yes sir. They wouldn't be held responsible for train orders. I just call your attention to it.

4343 Q. You are to assist him as best you can?

515 A. Yes sir.

4344 Q. That includes, protecting the rear and front end of the engine on the train?

A. Either way the necessity arises, yes sir.

4345 Q. Then, Mr. Hinitt, of course that day it was a part of your duty to keep a lookout both ahead and in the rear as to the best of your ability?

A. No, the rules state that if for any reason a train is stopped or reversed, where it becomes necessary, or it is liable to be hit or struck, you must protect, and then my duty becomes a protector at such time, otherwise I have no responsibility.

4346 Q. Do you know the condition of the ground where you fell?

A. Yes sir.

4347 Q. How was it?

A. Same as any other cut, higher at the top, lower down, drain ditch.

4348 Q. There was a drain ditch on the side?

A. I couldn't swear there was, there was a bankment of snow.

4349 Q. How much snow?

A. I wouldn't try to judge, I know when I fell it did not hurt me, I struck head first in the snow, but I wasn't thinking about anything then like that, but there was snow there.

4350 Q. I wish you would explain where Mr. Wright got caught?

A. You want me to start from the first?

4351 Q. Just brief, not in detail.

A. On what is termed the water tank on the left-hand side of the cab on the engine. He was pinioned between the running board of the engine and the leg of the tank just about the hips.

4352 Q. Were his feet inside or outside of the tank?

516 A. Well from the conditions there, you wouldn't know exactly what to say, they were in such a position that he was about as much out as in, except where he was caught.

4353 Q. Which way was he facing?

A. Out.

4354 Q. Where he was pressed, was it the front and back of him or side to side?

A. Side to side, facing rectangular with way train was running.

4355 Q. Then was he or was he not crushed from hips clear down?

A. No sir.

4356 Q. And during the twenty minutes or forty-five minutes, whatever it was, you were trying to get him out, he was pinioned in that position?

A. He was.

4357 Q. Why didn't you get him out quicker?

A. Was unable to.

4358 Q. Were you short on tools or anything?

A. Well, the tools that would be required in that particular case

I don't think they equip the engine with at all, I do not know, I am not versed in the equipment of an engine.

4359 Q. What do you know about the fact that somebody had to go clear to the Rock Island depot to get something to get him out?

A. No, I know better than that, for the simple reason that I sent for the tools myself, and we got them from the North Western section, the North Western tracks comes right close by and they brought their tools, Northwestern equipment is what we used.

4360 Q. So you did send for tools to the Northwestern section?

A. Yes sir.

4361 Q. What did you get?

A. I think it was either one or two jacks.

4362 Q. Any axes or jack screws.

517 A. Well they are track jacks.

4363 Q. How far did you have to go to get them?

A. I don't know.

4364 Q. About?

A. Some person that was standing there I asked to go and get them, and they were back right away, I don't know how far they had to go.

4365 Q. During the forty-five minutes or whatever length of time it was, was he conscious or otherwise?

A. Well I should judge that he was not, not rational, practically conscious.

4366 Q. Were you on this engine the day before from Phillipsburg?

A. No sir.

4367 Q. You started from here?

A. Started from here.

4368 Q. Do you know, of your own knowledge where you were going and what for?

A. Do I know of my own knowledge where I was going and what for?

4369 Q. What was the purpose you were going to Council Bluffs with this engine?

A. Well I can't say, only from hearsay, the engine was going to the shops.

4370 Q. For repairs?

A. For repairs.

4371 Q. What kind of a day was it cold or otherwise?

A. Very cold.

Cross-examination by E. P. Holmes:

4372 Q. Mr. Hinitt where was your engine when the emergency brakes were tried and the engine reversed, as to the viaduct?

518 A. Well that would be a pretty hard question to answer for I couldn't say.

4373 Q. Well you remember seeing Mr. Wright apply the emergency and reverse his engine?

A. I did.

4374 Q. And heard him yell "For God's sake jump"?

A. I did.

4375 Q. On which side of the engine?

A. North side.

4376 Q. Gone under the viaduct?

A. Yes sir.

4377 Q. Now at what rate of speed did you approach the viaduct as near as you can recollect?

A. About ten miles an hour.

4378 Q. And how far, as near as you can estimate, on the north side of the viaduct was the emergency applied?

A. As I stated before I wouldn't like to say, I don't know.

4379 Q. But you do know you were on the other side?

A. Yes sir.

4380 Q. What was the rate of speed as near as you could estimate, in your judgment, up to the time the emergency brake was applied?

Objected to as not proper cross examination, calling for an opinion and conclusion of the witness, and no proper sufficient foundation laid.

Sustained.

Exception.

4381 Q. The engineer hadn't decreased the speed up to the time he applied the emergency?

A. No sir.

4382 Q. At the time you was going out of the window of the cab, or lighting on the ground, the two engines come in collision?

A. They were.

4383 Q. And you got out just the moment they collided?

A. I was practically out of the way, on my way to the ground.

519 4384 Q. But when the engines collided, engine 1486 stopped did it?

A. No.

4385 Q. What did it do?

A. Started with the contact and then commenced to go back.

4386 Q. Commenced to go back?

A. Yes sir.

4387 Q. How far did it go beyond where you got out or laid on the ground?

A. I was right along the side of it when the contact came.

4388 Q. The impact came then just the moment you was getting out the road, the engine stopped right by you, right opposite the cab window?

A. I wouldn't state as to that, the engine was right along the side of me somewhere.

4389 Q. You knew, Mr. Hinitt, where the yard limits were?

A. Yes sir.

4390 Q. Had you ever gone through there with Mr. Wright before?

A. Never have.

4391 Q. The east yard limit is where, Mr. Hinitt?

A. Just east of the 27th street crossing.

4392 Q. How far east from that crossing, right by it?

A. I don't know exactly how far, out there, I should think about a quarter of a mile.

4393 Q. You had time table D did you?

A. Yes sir.

4394 Q. 11 D?

A. Yes sir.

4395 Q. Did engineer Wright have one?

A. Yes sir.

4396 Q. And you were familiar with the rules governing yard movements?

A. I am.

520 4397 Q. How far would you say it was that you could see from the viaduct east?

A. I don't say.

4398 Q. Can you say?

A. Well I don't know exactly what you mean.

4399 Q. From the left side, from the viaduct as you approach the viaduct on the south, how far can you see north or east or northeast?

A. I should judge about nine car lengths, that is if the engine is south of the viaduct, just before you enter, you could probably see that far.

4400 Q. How far?

A. About nine car lengths if the engine was south of the viaduct.

4401 Q. Now on the east side, how far can you see from the same position?

A. When you are under the viaduct you can see about the same distance.

4402 Q. You wouldn't pretend to give us the degree of curve?

A. No sir, I would not.

4403 Q. After you get on the north side of the viaduct, does that lessen the distance that you can see ahead?

A. Yes sir.

4404 Q. It lessens it?

A. Yes sir.

4405 Q. How much?

A. From the engineer's point of view, after he passes the viaduct going north, he would be unable to see except about three rail lengths.

(Mr. Berge then asks, "Three rail lengths? and witness answered "Yes sir.")

4406 Q. Mr. Hinitt how long is that?

A. Thirty foot to the rail, 90 feet.

4407 Q. Ninety feet to the rail?

521 A. 30 feet to the rail.

4408 Q. Were you acquainted with the fact that there was a yard engine there, switch engine, were you acquainted with that fact?

A. I didn't get that.

4409 Q. Were you acquainted with the fact that there was a switch engine at Lincoln working in the yard?

A. Yes sir.

4410 Q. How did you know, Mr. Hinitt, that the switch engine was there in the yard?

A. I know that there is a switch engine at Lincoln for industrial purposes.

4411 Q. And you had seen it there occasionally?

A. Oh, yes.

4412 Q. As you passed through Lincoln?

A. Yes.

4413 Q. As you approached Lincoln that day from the south, did you see it?

A. No I hadn't.

4414 Q. Was anything said to you about it at Lincoln, or anything like that?

A. No sir.

4415 Q. You didn't see it right at the depot in Lincoln?

A. No sir.

4416 Q. Yet it was a duty of yours to be on the lookout for that?

A. Nothing more than to proceed to the time card.

4417 Q. You were familiar with the speed limits here in Lincoln?

A. At that time, yes sir, that is as far as the time card specifies to us.

4418 Q. Now, Mr. Hinitt, the engineer took the place of the conductor he was the man in charge of that special train?

A. He was.

522 4419 Q. You took your orders from him?

A. Yes sir.

4420 Q. What I mean is this, that if he wanted to pass his engine out on a side track, he would direct you to open the switch?

A. Yes.

4421 Q. And you look to him as the conductor of that train?

A. Yes sir.

4422 Q. What class train was that, do you know?

A. Second class.

4423 Q. Second class?

A. Yes sir.

4424 Q. And would be classified as an extra train?

A. Yes sir.

4425 Q. It wouldn't have any definite time as appears on time table would it?

A. It would not.

4426 Q. It would run all together would it not according to orders received from the Dispatcher?

A. By telegraphic train orders?

4427 Q. Yes.

A. Yes sir.

4428 Q. Do you know the tonnage of that engine 1486?

A. Do you mean the weight of the engine?

4429 Q. Yes.

A. At that time, no I did not.

4430 Q. Might you not be mistaken as to the class of that?

A. If it comes down to that, it has no class; speaking from railroad term, we call it second class, but according to the schedule, it has no class. We speak of it as a second class train.

4431 Q. You and the others that were there at the time of this accident, did all in your power to help Mr. Wright?

523 A. We did.

4432 Q. And you got him out of there as quick as possible under all circumstances?

A. Yes sir.

Redirect examination by G. W. Berge:

4433 Q. It took you forty-five minutes to get him out?

A. Yes sir.

4434 Q. And during all that time he was in that pinioned condition as you described?

A. He was.

4435 Q. And you had to send to another railroad to get tools to get him out?

A. Didn't have to, but they were closer.

4436 Q. That was closer than to go to your own yards?

A. Yes sir.

4437 Q. You said upon cross examination that this train, this engine run upon train dispatcher's orders?

A. Yes sir.

4438 Q. The same as an extra train?

A. Yes, and it was an extra train.

4439 Q. It had no schedule time in the time table?

A. It did not.

4440 Q. Now you say that you are under the direction of Mr. Wright, the engineer?

A. That I was?

4441 Q. Yes?

A. Yes sir.

4442 Q. And when you were ringing the bell you did it under his directions?

524 A. No, I didn't do it under his directions, only that I knew it would have to be done and did it to save him the trouble of telling me.

4443 Q. Before you were sworn and testified, you never talked with me about this matter, I never asked you about anything you knew?

A. I never saw you before.

4444 Q. Did you talk with the attorney on the other side or did they talk with you?

A. Yes sir.

4445 Q. Last night?

A. Yes sir.

4446 Q. At the Hotel?

A. Yes sir.

4447 Q. You were subpoenaed by the plaintiffs weren't you?

A. Yes sir.

4448 Q. They were talking with you as late as ten or eleven o'clock last night?

A. No sir, I asked to be excused, hadn't been in the rooms but a few minutes.

4449 Q. They sent for you?

A. Well they notified me they wanted to talk to me, I didn't know what for until I came down.

Recross examination by E. L. Holmes:

4450 Q. Now in running your extra train, such as you were doing that day, the Engineer and the entire crew would be governed according to the rules of the time table?

A. You mean with relation to all the contents of that, that is general rules and laws, we would be governed by the time card the same as special trains.

525 4451 Q. Yes.

A. Yes sir.

Redirect examination by G. W. Berge.

4452 Q. About the speed proposition, of course people never agree on speed, did I understand you to say that you know just exactly that it was running that distance, that many miles an hour?

A. That is the estimate that the man generally puts on it, from experience.

4453 Q. It was a cold day and you were up there in the cab, no occasion for you to figure out the speed at that time?

A. That is second nature with us.

4454 Q. Second nature?

A. Yes sir.

4455 Q. Do you know how fast you were running when you crossed the Missouri Pacific track south of the Holdredge street viaduct?

A. Yes sir.

4456 Q. You had stopped there?

A. Yes sir.

4457 Q. You did stop there?

A. Yes sir.

4458 Q. And you know how fast you were running just before you stopped about two hundred feet below?

A. Well, probably we were going about six or eight miles an hour, hadn't had any chance to run, had taken water and didn't have any distance to go, just drifted down to the crossing and stopped and then started away from there.

526 Recross examination by E. P. Holmes:

4459 Q. Do you know how far it is from the Missouri Pacific crossing to the viaduct?

A. About two hundred fifty yards I should judge.

4450 Q. Two Hundred fifty yards, don't you know what it is in feet. Isn't it about 1500 feet?

A. I will say a quarter of a mile, that is about what it is.

LON H. HINITT.

D. F. GOINES, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, depose and sayeth as follows:

Mr. D. F. GOINES.

Direct examination by G. W. Berge:

4461 Q. Your name is D. G. Goines?

A. Yes sir.

4462 Q. Where do you live, Mr. Goines?

A. Fairbury, Nebraska.

4463 Q. How long have you lived here?

A. About four years.

4464 Q. What is your occupation now?

A. Fireman on the Rock Island.

4465 Q. How long have you been fireman on the Rock Island?

A. About two years.

4466 Q. And are you on the road or in the yards?

A. On the road.

4467 Q. What was your occupation in December 8 and 9, 1909?

A. Fireman.

4468 Q. For the Rock Island?

527 A. Yes sir.

4469 Q. Where were you engaged at what town or city?

A. Engaged at Lincoln, firing a switch engine.

4470 Q. Was your home then in Fairbury?

A. Yes sir.

4471 Q. Since that time were you continuously in the employ of the railroad?

A. Yes sir.

4472 Q. What was the number of your engine that day?

A. 1220.

4473 Q. You say on December 8?

A. December 8, 1909.

4474 Q. And that was the regular switch engine there?

A. Yes sir.

4475 Q. That switch engine is provided with foot boards in the rear and one in the front?

A. Yes sir.

4476 Q. How long had you been retained on that switch engine at that time?

A. That was the first day.

4477 Q. First day?

A. Yes sir.

4478 Q. And were you engaged and employed immediately before, as a fireman?

A. Out of Fairbury running on the road, I was extra fireman.

4479 Q. You say it was the first day, did you go to Lincoln that morning?

A. No, the night before.

4480 Q. And your engine was running which way, north or south?

A. Running south.

4481 Q. And on which side of the engine were you?

A. Left side.

528 4482 Q. That would be left hand side coming southward, or the east side of the track?

A. Yes sir.

4483 Q. Did you stay in the engine or did you get out before it collided?

A. I got out.

4484 Q. Which side of the engine, did you get out on?

A. Left hand side.

4485 Q. East side?

A. Yes sir.

4486 Q. In getting out, did you land on your feet or fall down?

A. Fell down.

4487 Q. Just explain how you got out.

A. I got out just as Mr. Hinit said, head first out of the cab window.

4488 Q. Are you clear about that, you went out the cab window?

A. Yes sir.

4489 Q. Did you see the Engineer get out?

A. Mr. Hall?

4490 Q. Yes.

A. No.

4491 Q. Did he get out on the same side you did?

A. No sir.

4492 Q. Before you jumped, had you seen the approaching engine from the other way?

A. Yes sir.

4493 Q. How far were you from the approaching engine before you first saw it?

A. I should judge about fifty or seventy-five feet.

4494 Q. How long is a car length?

A. About forty feet.

4495 Q. Forty?

A. Yes.

529 4496 Q. Now refreshing your memory, and for no other purpose, for I believe you want to be fair, at the Coroner's Inquest, I will ask you if this question wasn't asked you:—Question. How far were you away when you jumped before they came together.

A. Well as far as I could judge, it would be about three car lengths when they first showed up.

4497 Q. Three car lengths?

A. Well if I said it, it must be so.

4498 Q. Well I want your best recollection is all, if they are forty feet long?

A. Well that is the average car, the big car.

4499 Q. There are some shorter?

A. Yes sir.

4500 Q. Well if it was the average car, it would probably be one hundred twenty feet?

A. Yes sir.

4501 Q. And where were you when you first saw the approaching engine?

A. Upon the fireman's seat box, looking out of the window.

4502 Q. The fireman's seat box, in order to get down and get out where the place is to get in and out on, would you have to spend much time to get out there?

A. Well yes, quite a bit of time.

4503 Q. Winter time, you say?

A. Quite a bit of time.

4504 Q. Quickest way is out of the window?

A. Yes sir that is the way I would judge.

4505 Q. Could you tell how far you were from the viaduct when you first saw the engine?

A. Well no, I couldn't exactly.

4506 Q. You were on the inside of the curve weren't you?

A. Yes sir.

4507 Q. Did you see the engine before the engineer or afterwards?

530 A. Before the engineer.

4508 Q. Did you yell? What did you do?

A. Told them "There they were."

4509 Q. Did you say to jump?

A. That is all I said, I think, I wouldn't be positive whether I told him to jump or not.

4510 Q. But the very minute that you saw it, you jumped?

A. I made ready to get out as quick as I could.

4511 Q. You didn't take time to get down and around?

A. No I didn't.

4512 Q. You got out the window?

A. Yes sir.

4513 Q. Did you see your engineer at that time?

A. My engineer?

4514 Q. Yes sir.

A. No sir, not after I spoke.

4515 Q. Did you see him before you spoke?

A. Yes sir.

4516 Q. Where was he?

A. On the right hand side.

4517 Q. How did you know he didn't know the approach of the engine until you told him?

A. I don't think he could see it. He was on the outside of the curve.

4518 Q. You knew that an extra train or an engine was in the yards?

A. Yes sir.

4519 Q. When did you learn that?

A. Out on 27th street.

4520 Q. Who told you?

A. The foreman of the switch engine out there, Reuben Carr.

4521 Q. On there, your switch engine?

A. Yes, he told me on there.

531 4522 Q. He wasn't riding the train at that time with you?

A. Yes sir, come out.

4523 Q. And you, as fireman, knew that this extra was in the yards?

A. Yes sir.

4524 Q. And when you said "There she is" you referred to the one you knew was in the yards?

A. Yes.

4525 Q. How is that?

A. Yes sir.

4526 Q. Your engineer knew that she was in the yards as far as you know?

A. Yes sir.

4527 Q. You were then in the yard limits?

A. Yes sir.

4528 Q. You couldn't tell me how far north of the viaduct when you first saw the engine?

A. Well no, I couldn't, that is to the exact length or distance.

4529 Q. You say that was your first duty in the yards?

A. Yes sir.

4530 Q. Was it your first day over the tracks?

A. No sir.

4531 Q. You had run over the tracks for several years?

A. Not for several years; several times.

4532 Q. Well only in a general way, a large number of times or few?

A. Not what you would say a large number of times.

4533 Q. A number of times?

A. Yes.

4534 Q. How many brakemen were with you at that time?

A. Two or three with the foreman.

4535 Q. Three with the foreman?

A. Yes sir.

4536 Q. Where were they?

532 A. Well I couldn't say where they were, whether on the back or the front of the engine.

4537 Q. Well then your testimony is that you don't know?

A. Yes, I don't know definitely where they were.

4538 Q. Don't you know where any were?

A. Yes, there was one, I will say, on the back.

4539 Q. You know which one?

A. No, I don't.

4540 Q. Of course, the first minute you laid your eyes on the approaching engine, you yelled to the engineer?

A. Yes sir.

4541 Q. You lost no time?

A. No, I didn't.

4542 Q. Did you jump immediately?

A. I did.

4543 Q. Can you tell me how soon he jumped, the engineer?

A. No I couldn't, I couldn't say; but he jumped, I will say that.

4544 Q. How do you know?

A. I seen him getting up.

4545 Q. Did he get up before you did?

A. No sir.

4546 Q. He was getting up was he?

A. Yes sir.

4547 Q. Well, when he was getting up, where were you?

A. At that time, I walked around the engine to see if he got off.

4548 Q. Did you get hurt in jumping off?

A. Nothing only shook up.

4549 Q. How about your arm?

A. Shook it up a little bit, lit on my shoulder.

533 4550 Q. You have heretofore called it a sprane?

A. I didn't know whether it was a sprain, didn't go to a physician, wasn't off?

4551 Q. What place on the arm?

A. Long up here (Witness indicating).

4552 Q. Close to the shoulder?

A. Yes sir.

4553 Q. Did you fall on your shoulder?

A. Yes sir.

4554 Q. Which?

A. Left one.

4555 Q. Was there any flagman there that day?

A. Flagman, where?

4556 Q. In the cut?

A. No, that is you mean outside of Mr. Hinitt?

4557 Q. Outside of the train crew on your engine or the other engine, was any flagman stationed in the cut?

A. No sir.

4558 Q. Was there any semaphore?

A. No sir.

4559 Q. Was there anything outside of the usual track?

A. No sir.

4560 Q. Now in that curve, Mr. Goines, take it right at the place where the curve is, and from your side coming this way, being on the inside, have you observed to see how far ahead you could see?

A. No, I never paid any particular attention.

4561 Q. What would you say, how many car lengths?

A. I suppose if fellows would look close, he could probably see four car lengths.

4562 Q. Well that day you probably saw the approaching engine, just as quick as it could be seen.

534 A. Yes sir.

4563 Q. Coming round from behind the curve?

A. Yes sir.

4564 Q. Then if your train was going southward, and you were on the left side, the curve was so sharp that you could see about three cars or a little more ahead of you, and that is all?

A. That is what I put it that day, but as I said if he exerted himself he might see a little further.

4565 Q. Now, why couldn't you see farther?

A. On account of the curve?

4566 Q. Curve? Well can't you see through a curve, is there an embankment or something?

A. Embankment.

4567 Q. In a general way, state how close the embankment is; you haven't measured, just your judgment?

A. Some places it is eight or ten feet from the track.

4568 Q. Abrupt, straight up?

A. Slanting incline.

4569 Q. You could crawl up?

A. If a fellow took time he could.

4570 Q. It is pretty straight up, isn't it?

A. Yes.

4571 Q. When you said a while ago you knew this engine was in the yard, you knew it was the same as an extra train?

A. Yes sir.

4572 Q. Did you know it was only an engine or what kind of a train?

A. Don't know whether it was an engine or train; just an extra.

4573 Q. Was the ground frozen?

A. I guess.

4574 Q. How?

A. Yes sir.

4575 Q. Snow on the ground?

535 A. Yes sir.

4576 Q. How much?

A. I couldn't say, I should judge about six or eight inches.

4577 Q. Well then, Mr. Goines, you got off right away; your engine run, well the two engines we will say run three car lengths from the place you jumped off, anyhow?

A. Our engine didn't run any.

4578 Q. They come together?

A. Yes.

4579 Q. The two engines run the distance that you first saw the other engine?

A. The two engines run the distance.

4580 Q. Yes sir, that is the approaching engine, the place where you saw it was about three car lengths away?

A. Yes sir.

4581 Q. The engines came together?

A. Yes sir.

4582 Q. And the very minute you saw the other engine, you jumped?

A. Yes sir.

4583 Q. Do you know whether the sun was shining?

A. Clear as it is today.

4584 Q. You didn't take time to make any calculations as to the speed they were coming?

A. No I didn't.

4585 Q. You don't know?

A. Know the speed they were going?

4586 Q. You don't know anything about their speed?

A. No sir.

4587 Q. You heard their bell ringing?

A. No, I heard my own.

4588 Q. You heard their bell ringing?

A. No, I didn't hear their's, I say I heard my own.

536 4589 Q. Could you go out north of that viaduct and point out the place where the engines come together?

A. Well no I couldn't to the spot.

4590 Q. You couldn't?

A. No.

4591 Q. I wish you would state the distance from the viaduct when you first saw the approaching engine as best you can?

A. The distance from the viaduct?

4592 Q. Yes sir, how far north of the viaduct were you the first minute you saw the approaching engine?

A. I should judge about 150 feet in my judgment, north of the viaduct.

(Judge Holmes said "North and east," and witness then answered "Northeast of the viaduct" there.)

4593 Q. Don't you know that is just where the collision took place?

A. Where?

4594 Q. 150 feet north of the viaduct?

A. Well, I don't know that.

4595 Q. How?

A. You are sure that is where it took place?

4596 Q. I am asking you.

A. You asked me if that is where the place was?

4597 Q. Is that where it took place?

A. Right around there close, not just on that spot.

4598 Q. Well, didn't you see the approaching engine 300 feet away?

A. I did not.

4599 Q. You couldn't see it?

A. No sir.

4600 Q. You couldn't see an approaching engine over one hundred twenty-five feet away could you?

A. Yes I think I could.

4601 Q. How?

A. I think I could.

537 4602 Q. How far do you say you think?

A. I said about one hundred fifty feet, didn't I?

4603 Q. That you could see an approaching engine?

A. Yes sir.

4604 Q. One Hundred fifty feet?

A. Yes sir.

4605 Q. Now then, you are satisfied, I want your best judgment, to have the record show that when you first saw the approaching engine, you were about one hundred fifty feet north of the viaduct?

A. Well, I will be satisfied, that is my judgment now.

4606 Q. Yes sir, I want just your best recollection, and that is what it is, that is your best recollection?

A. Yes sir.

4607 Q. Did you examine your engine after the collision?

A. No.

4608 Q. Was it derailed?

A. Just the pony trucks.

4609 Q. Was the engine reversed?

A. I think it was.

4610 Q. Did all the other men get off your engine?

A. Yes sir.

4611 Q. Did you see any of them jump?

A. No, I didn't see them jump.

4612 Q. None of them?

A. None of them.

4613 Q. Did you see them immediately after they did jump?

A. Yes sir.

4614 Q. Which way were they, north or south?

A. Some of them were north, Engineer north, some were east.

4615 Q. Engineer north of you?

538 A. Yes sir.

4616 Q. Then he got off before you did?

A. He was on the north side.

4617 Q. He was on the west side of the track?

A. I call it north, you go pretty near east after you turn.

4618 Q. Assuming it was running north, now was any of the trainmen down toward the viaduct or were they farther away from the viaduct than you?

A. Soem were farther away, all that I saw.

4619 Q. All of them?

A. Yes sir.

4620 Q. Most of the- got off before you did?

A. Must have.

4621 Q. Where was the engineer?

A. On the right hand side as I told you before.

4622 Q. Was he farther away or nearer the viaduct than you were?

A. He was nearer the viaduct.

4623 Q. Was he up and around walking?

A. Just got up and shaking the snow off.

4624 Q. He fell down?

A. Yes sir.

4625 Q. Did you see any other- shaking snow off?

A. No.

4626 Q. Did you see any of the brakemen, whether they fell down getting off?

A. No, I didn't.

4627 Q. That is a pretty sharp curve there isn't it?

A. Yes sir.

4628 Q. Dangerous place?

A. I couldn't say.

4629 Q. Well the reason you can't see only three car lengths ahead, is because the curve is sharp?

A. Yes sir and the embankment.

539 4630 Q. If the embankment was farther away, you could see farther?

A. Yes sir.

4631 Q. Now if the curve was not so acute, you could see farther?

A. Yes sir.

4632 Q. Did you see Mr. Wright while pinioned there?

A. Yes sir.

4633 Q. Did you work and help get him out?

A. Yes sir.

4634 Q. Took you quite a long time?

A. Yes sir.

4635 Q. Over half an hour?

A. Yes sir.

4636 Q. They say about forty-five minutes?

A. I guess, right around there.

4637 Q. Was he conscious or unconscious?

A. I should judge he was conscious, he talked to me and I talked to him.

4638 Q. I wish you would tell your recollection as to how he was pinioned in there?

A. Well, he was caught just above the hips.

4639 Q. Side ways or between the back and front side?

A. Side ways.

4640 Q. And the bumpers were practically clear together?

A. Tank and running boards were where he was caught.

4641 Q. Not much space between?

A. Not much space.

4642 Q. How many inches?

A. I should judge about six inches.

4643 Q. Did you see him after he got out?

A. Yes sir.

4644 Q. Did you see him at the hospital?

A. Yes sir, I went to the hospital with him.

540 4645 Q. And did you remain there?

A. I remained there until 4:30 in the evening as far as my recollection.

4646 Q. Did you see him after that?

A. No sir, not alive.

4647 Q. That is what I mean; you saw him dead?

A. Yes sir.

4648 Q. Attended his funeral?

A. Yes sir.

4649 Q. You attended his funeral within a week?

A. I attended it to the train, seen him off on the train, came to Fairbury on the same train he did, got off here.

4650 Q. How soon after he was injured?

A. Two days.

4651 Q. He was dead then?

A. Yes sir.

4652 Q. Have you traveled through the cut since?

A. Yes sir.

4653 Q. Is there a semaphore there now?

Objected to as immaterial, irrelevant, and not within the issues of this case. Sustained. Exception.

4654 Q. And, if with that semaphore there north, I call it north, going just as you did that day, a train or an engine south of the viaduct, I call it, the semaphore up now would tell you if a train was there.

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

4655 Q. That semaphore is probably a half mile north of the viaduct, isn't it?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

4656 Q. Yes.

A. It is.

4657 Q. How far is it?

541 A. End of cut?

4658 Q. How far is the end of the cut?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Overruled. Exception.

4659 Q. But if there was a train or engine south of the viaduct, pretty near clear to the depot, the semaphore now there, indicates it, all of a half mile north of the viaduct. Does it?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

4660 Q. Yes sir, but you can see the semaphore a little beyond?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

4661 Q. What does that semaphore indicate as to where the engine is?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

4662 Q. Would it be any place between the depot and the south end of the viaduct?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

4663 Q. Does the north semaphore go down as soon as the engine going northward passes the south semaphore?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

4665 Q. Where is the south semaphore?

Objected to as immaterial, irrelevant, and incompetent, and not within the issues of this case. Sustained. Exception.

4666 Q. That is south of the viaduct?

A. Yes sir.

4667 Q. About a quarter of a mile?

A. I should judge about that.

542 4668 Q. How did you get over to where Mr. Wright was pinioned?

A. Walked around the engine.

4669 Q. But you commenced to jump when your engine was three-car lengths or more from the approaching engine?

A. I commenced to jump when I first seen it.

4670 Q. Well it was three car lengths or more away?

A. It is about that.

4671 Q. And you didn't see a single other man jump?

A. Cause there was none that jumped on that side.

Cross-examination by Mr. G. D. De Lacy:

4672 Q. Mr. Berge has asked you how far the engines went after they came in sight of each other; now I will ask you how far did your engine go after it came in sight of engine 1486?

A. When I got up I was just even with the tank.

4673 Q. So about how far had your engine gone?

A. I should judge about fifteen feet.

4674 Q. How fast was your engine going at the time you saw the other engine?

A. About three miles an hour?

4675 Q. Did you hear Engineer Hall put on the air?

A. I couldn't answer that, I hollered as I was getting out.

4676 Q. But you went only about fifteen feet when you came in sight of 1486?

A. Yes sir.

4677 Q. Where had you come from?

A. 27th Street.

4678 Q. What were you doing there?

A. Had been over to the B. & M. transfer.

4679 Q. And then you came from the B. & M. transfer on the main line.

A. At Twenty-seventh street.

543 4680 Q. Where is the 27th street crossing with reference to this viaduct, this cut?

A. It is a half or three-fourths of a mile east of the cut.

4681 Q. Then you came down the main line?

A. Yes sir.

4682 Q. And is there a crossing a block east of this cut?

A. Well, I couldn't say whether there is or not.

4683 Q. Was your bell ringing?

A. Yes.

4684 Q. Did you have an automatic bell ringer?

A. No, I was pulling with a rope.

4685 Q. Did you hear a bell on 1486 ringing?

A. No sir.

4686 Q. Did you hear a whistle?

A. No sir.

4687 Q. Did Mr. Hall whistle when he crossed the crossing a little bit east?

A. He whistled at 27th street and as I said in my statement, I think he whistled just before he went into the cut.

4688 Q. That is your best judgment?

A. Yes sir.

4689 Q. You know what the term, under full control is?

A. Yes sir.

4690 Q. Was your engine at that time under full control?

Objected to the question as calling for an opinion and conclusion of the witness and not a statement of any fact, and not proper cross-examination. Sustained. Exception.

4691 Q. You say that you knew that there was an extra train in the yards?

A. Yes sir.

4692 Q. Mr. Carr had told you that?

A. Yes sir.

544 4693 Q. Consequently you were on the look out for the light engine?

A. Yes sir.

6494 Q. And were running slow, watching for it?

Objected to as not proper cross-examination and not calling for a statement of any fact or conversation, but an opinion and conclusion of the witness as to how he was running, incompetent. Overruled. Exception.

A. Yes sir.

4695 Q. You were looking ahead were you, keeping proper look-out?

A. Yes sir.

4696 Q. Which window were you looking out of?

A. Cab window, side window.

4697 Q. Had it opened?

A. Yes sir, was looking out of that.

4698 Q. You saw 1486 at the first instant, it was possible to see it from your position, did you?

A. Yes sir.

4699 Q. Do you know whether you were in the yard limits at the time that you first saw 1486?

A. Yes sir.

4700 Q. And the collision occurred in the yard limits?

A. Yes sir.

4701 Q. You say you are not able to state the speed of the engine 1486?

A. No.

4702 Q. Now what is your best judgment, was that engine going faster than your engine was going?

A. I don't know.

4703 Q. Now you say after you first came in sight of 1486, your engine ran about fifteen feet?

A. Yes sir.

4704 Q. And how far were they apart about at the first moment you saw 1486?

545 A. One hundred feet.

4705 Q. Then how far did the oncoming engine run toward your engine after you first came in sight of it?

A. I can't say.

4706 Q. That would be the difference wouldn't it?

A. I can't say positive, I don't think both engines were going at the same rate of speed.

(Motion to strike above answer out as it is not in response to the question.)

A. I couldn't answer that question.

4707 Q. Well, Mr. Goines, it would be the distance the two engines were apart at the first instance they come in sight of each other minus the fifteen feet that your engine run?

Objected to as not proper cross examination assuming something that witness has not testified, incompetent, immaterial and irrelevant, calling for an opinion and conclusion of the witness, and a calculation and not a statement of any fact. Overruled. Exception.

A. I guess it would.

4708 Q. You said that there was a difference in the speed of the two engines?

A. I didn't say there was a difference in speed, I thought the engine wasn't running at the same rate of speed.

4709 Q. Which engine was running faster?

Objected to as not proper cross examination, not statement of fact, calling for a comparison and calculation, not based upon any knowledge; as a matter of fact the witness has stated he did not know how fast the train was running. Overruled. Exception.

A. Their engine.

4710 Q. Engine 1486?

546     Objected to as not proper cross examination, not a statement of any fact, calling for a comparison and calculation, not based upon any knowledge; as a matter of fact the witness has stated he did not know how fast the train was running. Overruled. Exception.

A. Yes sir.

Redirect examination by G. W. Berge:

4711 Q. The very minute you laid your eyes upon the approaching engine you jumped?

A. I spoke to the Engineer and said "There they are" and jumped.

4712 Q. And that is all you know about this speed of the other engine?

A. Yes sir.

4713 Q. And of course your testimony is that you don't know how fast the other engine was running, and you don't?

A. I don't know, that is to the speed.

4714 Q. You wouldn't swear that your engine whistled after you left 27th street?

A. I will not swear positively.

4715 Q. You wouldn't swear that the engine was reversed, your engine?

A. No, I wouldn't.

4716 Q. Now of course, a man on an engine, especially an engine without any cars to it, if reversed lever is applied, if that is what you call it, and the emergency brake used, when that is done, any man on the engine knows it?

A. Knows that?

4717 Q. When that is done, any man knows it.

A. Yes he does if he does it.

4718 Q. And it will throw him forward?

A. Yes sir; you mean throw who forward?

547     4719 Q. Any man on the engine     Any man on the engine, which way will it throw him?

A. According to his position.

4720 Q. Well if he is going south, and as quickly as possible as the engine can get stopped, if you were standing in the cab, which way would you likely be thrown?

A. You would kindly be jerked up.

4721 Q. Which way?

A. West; or south as you call it.

4722 Q. You wouldn't say that anybody was on the front foot board?

A. No, I wouldn't.

4723 Q. You will say that you don't remember seeing anybody there?

A. Yes sir, that is not on my side.

4724 Q. That is what I mean. Do you know how quickly engines can be stopped, given the limits per hour in which they are running?

A. No, I don't.

4725 Q. If, say, an engine running twenty miles an hour, and reverse lever applied and emergency brake put on, how quickly could it be stopped, in what time, do you know?

4726 Q. —.

A. I don't know, I never tried, never seen it done, going that rate of speed. Never seen it tried.

4727 Q. Well it can be stopped pretty readily can't it?

A. I should judge it could.

Recross-examination by G. D. De Lacy:

4728 Q. You will swear, Mr. Goines, that you did stop within fifteen feet?

A. No, I won't swear that it stopped within fifteen feet, but I judge about fifteen feet.

548 4729 Q. Well you will swear it stopped?

A. Yes sir.

4730 Q. And it was stopped, Mr. Goines, before it was hit?

A. No.

D. F. GOIENS.

G. W. HALL, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

Direct examination by G. W. Berge:

4731 Q. Your name is G. W. Hall?

A. Yes sir.

4732 Q. What is your occupation, Mr. Hall?

A. I am unemployed at the present time.

4733 Q. On December 8, 1909, were you in the employ of the defendant railroad?

A. Yes sir.

4734 Q. You were the Engineer on the switch engine in the yards at Lincoln?

A. I was.

4735 Q. Mr. Hall, give us your best recollection as to how far north as I call it, of the viaduct to where the collision took place?

A. Well, I should judge about one hundred fifty feet.

4736 Q. You were going which way?

A. Going south.

4737 Q. An- naturally you would be riding on which side of the engine?

A. Right hand side.

4738 Q. On the west side?

549 A. On the north side.

4739 Q. It seems north and south to me, and I guess east and west to you?

A. It seems north and south to me.

4740 Q. You would be on the west side, then?

A. Yes, on the west side.

4741 Q. And your engine was No. 1220?

A. Yes sir.

4742 Q. How long had you been engineer of that switch engine?

A. A little over two months, if I recollect right.

4743 Q. Were you familiar with the yards?

A. I was.

4744 Q. Were you familiar with this cut?

A. Yes sir.

4745 Q. Did you know whether or not there was a semaphore in the yard, at this place, at that time?

Objected to as immaterial, irrelevant, and not within the issues of this law suit. Sustained. Exception.

4746 Q. At that time did the defendant have any flagman, or anybody in that cut to warn approaching trains from either directions?

Objected to as immaterial, irrelevant, and not within the issues of this case. Sustained. Exception.

4747 Q. Mr. Hall, from the side that you were on, state whether you could see ahead, and if so, how far?

A. Well, I should judge I could see about sixty or seventy feet, something like that. Maybe a little more and maybe a little less.

4748 Q. You say the curve was swinging to the left as you were going southward?

A. Yes sir.

4749 Q. State whether it was an acute curve or not?

A. Well, the curve is a sharp curve, as everybody knows.

550 4750 Q. You know it?

A. Yes sir.

4751 Q. You say you had been running around the curve for a couple of months?

A. Yes sir.

4752 Q. And you think, sitting on the right hand side of your engine, you could see how far southward, if that was the right direction?

A. I should judge about seventy feet?

4753 Q. Did you know this Extra was in the yards that day?

A. Not until the yard master told me.

4754 Q. And when did he tell you?

A. When we were leaving 27th street.

4755 Q. What time of the day was that?

A. About two o'clock, I should judge, maybe later.

4756 Q. Who was the yard master?

A. Carr.

4757 Q. Hadn't you been down town and went up there before that?

A. Yes sir.

4758 Q. Hadn't you seen the engine by the depot down town?

A. I had not.

4759 Q. Then you learned it at 27th street?

A. Yes sir.

4760 Q. Were you told where the engine was?

A. They said it was at the depot.

4761 Q. Did you know whether it was an engine or train?

A. They said it was a light engine?

4762 Q. And 27th Street crossing is half mile, pretty near, from the place where the accident occurred, or more?

A. 27th street to where the accident occurred?

4763 Q. Yes?

A. I should judge about one-quarter of a mile.

551 4764 Q. Now, outside of that, had you seen the approaching engine, before your fireman called to you?

A. No sir.

4765 Q. That is the first knowledge you had?

A. Yes sir.

4766 Q. Did you see him when he called?

A. I wasn't looking at him.

4767 Q. Did you hear him say something?

A. Yes sir.

4768 Q. What did he say?

A. He said, "Here they are."

4769 Q. Of course you couldn't remember the exact language?

A. I think that is the exact words he used, as near as I can remember; he said, "Here they are"; of course it might be a little different.

4770 Q. And when you jumped out, did you fall?

A. Well, I jumped with the intention of falling?

4771 Q. Well, did you fall, is my question?

A. Yes sir.

4772 Q. You fell down?

A. Yes sir.

4773 Q. And, state your position on the ground after you fell.

A. By the way, I would like to withdraw that *question*, I didn't fall, because I lit on my head; now I don't know whether you would call that falling that way or not.

4774 Q. I just want it just your way.

A. Well that is the way. I lit on my head.

4775 Q. Lit on your head?

A. Head and shoulders.

4776 Q. Did you go out of the window or between the cab and coal car?

A. I went out the window.

552 4777 Q. Are you sure about that?

A. Yes sir.

4778 Q. What is the construction of the cab in the engine No. 1225, is it?

A. 1220.

4779 Q. Yes, No. 1220.

A. Well, it is on the order of No. 1486, there is a step where you had to step upon the running board to get on the seat.

4780 Q. Well, but in getting up on the step to get on the seat, did you go frontwards or sideways?

A. Sideways.

4781 Q. Well, then, you just stepped westward straight up, just one step up and there was your seat?

A. Yes sir.

4782 Q. You never saw this approaching engine at all ahead until you got outside?

A. Oh, yes.

4783 Q. How long since you have worked for the Rock Island?

A. About eleven months, I think.

4784 Q. Since you worked for them?

A. Yes.

4785 Q. How long after this injury to Wright, this collision, did you quit work?

A. Two months.

4786 Q. Did you remain in the Lincoln yards during those two months?

A. I remained there about three weeks.

4787 Q. And where did you put in the balance of your time?

A. On the road out of here.

4788 Q. And then you quit and you have not been working for them since?

A. No.

4789 Q. And you are not working for them now?

553 A. No.

4790 Q. Were you relieved from your duties?

A. Sir?

4791 Q. Were you relieved or did you resign?

A. I was relieved.

4792 Q. Was it a cold day that day?

A. It was.

4793 Q. What was your recollection about the time of the day?

A. I think it was about 2:15 or 2:20, something like that.

4794 Q. You helped Mr. Wright out?

A. I did.

4795 Q. What is your recollection how long it took to get him out?

A. Something like forty-five minutes.

4796 Q. How many brakemen were with you that day?

A. We didn't have any brakemen at all.

4797 Well, call them switchmen?

A. We had two switchmen, and the Yard Master.

4798 Q. Reuben Carr?

A. Yes sir.

4799 Q. J. H. Francisco?

A. Yes sir.

4800 Q. And J. McKinstry?

A. Yes sir.

4801 Q. Besides your fireman?

A. Besides the fireman.

4802 Q. Mr. Goiens?

A. Yes sir.

4803 Q. Do you know, as you were coming southward, where these three men were located on the engine?

A. Well, if I recollect right, they were on the back foot board. I am not sure, I wouldn't be positive, but I think that is where they were.

554 4804 Q. That is your best recollection?

A. Yes sir.

4805 Q. You have no recollection of any of them being on the front foot board?

A. No sir.

4806 Q. Did you see Mr. Goiens jump out?

A. I did not.

4807 Q. Did you see any of your men get off from the engine?

A. I did not.

4808 Q. Did you see any of the men on the approaching engine get off.

A. No sir.

4809 Q. Is your Switch Engine, number 1220, a large or small engine?

A. She was a smaller class engine than the other engine.

4810 Q. How old a man, are you, Mr. Hall?

A. I will be 31 in March.

4811 Q. How long had you been an engineer at that time?

A. A year and eight months.

4812 Q. At that time?

A. Yes.

4813 Q. When you said a while ago, you jumped with the intention of falling, did you mean it just that way?

A. I mean that the way I went out of the window, it would be impossible for me to light on my feet.

4814 Q. How did you go out the window?

A. I just went head first like a man would dive in the river.

4815 Q. How far away from the engine did you light?

A. Oh, probably four feet, or five feet.

4816 Q. How did you fall, on which shoulder?

A. My right shoulder, if I remember right.

4817 Q. Did it hurt you any?

A. I didn't notice it at all at the time; I felt it two or three days afterwards.

555 4818 Q. When you picked yourself up, did you see your brakemen or switchmen, could you locate where they were?

A. Well, I remember some of them coming around to where I got up, I don't remember just who it was.

4819 Q. Well, you got up right close to where Mr. Wright was pinioned?

A. Oh, no.

4820 Q. What?

A. No sir, he was on the other engine.

4821 Q. I understand, but it was only the length of the engines apart?

A. The length of the two engines.

4822 Q. You got out before the collision?

A. Just as I hit the ground, the engines hit.

4823 Q. You think that the engine cleared you, or did it not, from where you were laying in the snow, had the whole engine passed you?

A. No, the tank was about half way past me, maybe more. I was right along the side of the tank when I got up.

4824 Q. Did you hear Mr. Wright's whistle blow or bell ring?

A. I did not.

4825 Q. I wish you would state, not when you heard, or when anybody told you, when you first saw the approaching engine?

A. Well, I first saw them when they were about, I should judge, seventy feet, maybe a little more, away from me.

4826 Q. Now, to refresh your memory, Mr. Hall, and for no other purpose, for I believe you want to give your best recollections, at the Coroner's inquest, what is your recollection about this question being asked, and this answer: Q. When you saw that you were going to collide, how far were you apart when you first saw them? and your answer was: About three car lengths. Is that what you saw when you first saw them?

A. Well, I said about seventy feet, maybe more.

4827 Q. A car is how long?

556 A. Some cars are thirty feet and some are forty feet?

4828 Q. Well, what I am getting at is the best that can be said, it is only guess on your part.

A. Yes, as to the distance.

4829 Q. A man would hardly guess one day the same as another, might not.

A. No.

4830 Q. Of course, Mr. Hall, even though you had not known of this extra, in the yards, your duty still would have been to look out for such trains like that, wouldn't it?

A. Yes sir.

4831 Q. It was really only an accident that you did not learn actually that there was an engine in the yards?

A. Oh, no, I was told that there was a light engine in the yard.

4832 Q. Every time there is an extra in the yard?

A. No sir.

4833 Q. Then just as likely as not, this information might not have come to you?

A. No.

4834 Q. It don't always come to you?

A. No.

4835 Q. But on this particular day, there was an extra in the yard?

A. I did not know that there was one in the yard. He told me, he didn't know where they were going, or which way.

4836 Q. Was Mr. Wright conscious when he was pinioned there?

A. In my opinion he was.

4837 Q. Did he talk to you?

A. He didn't talk to me, said something about his hands being cold.

4838 Q. He didn't say anything about how it happened?

A. No sir.

4839 Q. Do you know about a semaphore being in that cut now?

Objected to as immaterial, irrelevant and not within the issues of this law suit. Sustained. Exception.

4840 Q. At that time, was there a semaphore in that cut or at either end of it?

Objected to as immaterial, irrelevant and not within the issues of this law suit. Sustained. Exception.

4841 Q. At that time was there a flagman or any other precaution in the cut?

Objected to as immaterial, irrelevant and not within the issues of this law suit. Sustained. Exception.

4842 Q. Then your best recollection is that the accident occurred one hundred feet north of the viaduct?

A. Yes sir.

Cross-examination by E. P. Holmes:

4843 Q. You were not relieved from services on account of the happening of this accident we were talking about?

A. I was not.

4844 Q. At the time you got off, Mr. Hall, of the engine, what was its condition as to being reversed or air applied?

A. The air was in the emergency, and the reverse lever was in the back motion.

4845 Q. You did that before you jumped?

A. Yes sir.

4846 Q. What was the speed of your engine at that time, the time you jumped?

Objected to as not proper cross-examination; incompetent, calling for an opinion and conclusion of the witness, no foundation laid. Sustained. Exception.

4847 Q. That is your judgment now is it?

A. Yes sir.

4848 Q. You said something about the only thing governing that cut was the rulage of time table?

558 A. Yes sir.

4849 Q. So it wouldn't have made any difference to you whether you knew of the engine being in the yard or not, you would have progressed just as you did in compliance with the rules?

A. Yes sir.

4850 Q. Now I wish you would tell just what you mean by those rules?

A. I mean by those rules, the cut is so that you can't see the track

very far ahead of you, and in order to be able to stop you have to have your engine going at a very slow rate of speed.

4851 Q. How slow?

A. Well I wouldn't want to go any faster than I could be able to avoid accident.

4852 Q. Now are there anything in the rules as to the right of way or anything of that kind?

A. As to the right-of-way?

4853 Q. Yes, did you have the right to be where you were?

A. Yes sir, the yard engine has a right any place in the yard.

4854 Q. At this place, you were within the yard?

A. Yes sir.

4855 Q. What train did you have to look out for, Mr. Hall?

A. All first-class trains.

4856 Q. How about second class trains?

A. Don't have to look out for them at all, you have to keep your engine under control so that you could stop at the distance you could see when clear.

4857 Q. That applies to all trains except first-class trains?

A. Yes sir.

4858 Q. What is a first-class train?

A. I mean passenger train?

4859 Q. And what is a second class train?

A. Second class train is supposed to be a through freight train, what they call time freight train.

559 4860 Q. Suppose a first-class passenger train loses any time and is delayed, does it become a second-class train, and runs on train orders then or schedule?

A. It doesn't become second class train, though it runs on train orders, that is if it is over twelve hours late.

4861 Q. I wish you would define once more what you mean by being under full control?

A. Well the meaning of, under full control, is able to stop within the distance that you can see that the track is clear.

4862 Q. So that, if I understand it, on a straight piece of track, speed of twenty-five or thirty miles or more, might be under control?

A. Yes if you can see thirty miles, and the track is clear, you are under control.

4863 Q. Now in a cut and curve such as you were, or at the time of this accident, the speed would have to be greatly reduced you say because the distance was so short that you could see ahead?

A. Yes sir.

4864 Q. Now, at this time was your engine under full control?

Objected to, as it is not proper cross-examination, calling for an opinion and conclusion of the witness. Sustained. Exception.

4865 Q. If the other engine had been under full control at that moment there wouldn't have been any collision would there?

Objected to as not proper cross-examination, calling for an opinion and conclusion of the witness, and not a statement of any fact. Sustained. Exception.

4866 Q. Could there have been a collision between those two engines if they were both running under full control?

Objected to as not proper cross-examination, calling for an opinion and conclusion of the witness and not a statement of any facts, and invading the province of the Jury. Sustained. Exception.

560 4867 Q. I want to ask you about the windows in the cab, the window directly in front, they were closed?

A. Yes sir.

4868 Q. State fully what their condition is as to the ability to see out?

A. Perfectly clear.

4869 Q. Your engine was going south?

A. Yes sir.

4870 Q. And were you sitting on your seat there looking out of the window?

A. Yes sir.

4871 Q. You were not looking out of the side?

A. I was looking out of the side window.

4872 Q. Was that open?

A. Yes sir.

4873 Q. And your head was on the outside?

A. Yes sir.

4874 Q. You could see just as far could you, not out of your front cab window, as you could looking out the side window?

A. Well I don't know about that, I believe I could see a little farther looking out the side window.

4875 Q. And you were doing that?

A. Yes sir.

4876 Q. Now when you jumped out, how far did your engine proceed from where you lit on the ground?

A. She didn't move half the length of herself.

4877 Q. Do you speak now of the engine, or of the engine and tank?

A. Engine and tank.

4878 Q. Then half of the length of that engine and tank, that would be how many feet?

A. Well, I should judge about twenty-five feet, maybe thirty.

4879 Q. Twenty-five or thirty feet?

561 A. Yes.

4880 Q. About the time you landed on the ground, the collision occurred, I understand?

A. Just as I hit the ground the collision occurred.

4881 Q. Were you able to observe it all, whether there was any lessening of the speed of the engine 1486 from the time you first saw it until the time it struck yours?

A. Not from the way the crash came, it didn't sound like it.

4882 Q. Had your engine stopped, Mr. Hall, at the time of the impact?

A. Now as to that, I couldn't say, my head was in the snow when they hit.

4883 Q. As an engineer, Mr. Hall, and with the experience you have had in operating an engine, I want to ask you if a light engine coming from the south, going northeast, if approaching viaduct, at the rate of ten miles an hour, would be, in your judgment as an engineer, under complete control, and answer it with reference to engine 1486?

Objected to question as not proper cross examination incompetent, immaterial and irrelevant, calling for an opinion and conclusion of the witness, and not proper sufficient foundation laid and asking indirectly to lay the blame off on the dead man, who isn't here to speak. Sustained. Exception.

4884 Q. Having reversed your engine 1220, did it proceed to move back?

A. My engine?

4885 Q. Yes.

A. No sir.

4886 Q. Why not?

A. Because it was going ahead.

4887 Q. What?

A. It was going ahead.

4888 Q. But if you reversed it, wouldn't it when it stopped going ahead, commence to go back?

A. Well it didn't stop going ahead.

4889 Q. It didn't stop going ahead?

A. Not to my knowledge.

4890 Q. Didn't it move backwards?

A. It did not.

4891 Q. Why not?

A. Brakes were set.

4892 Q. Was there any other reason?

A. All the reason I could tell you.

4893 Q. What was its condition on the rail?

A. The pony trucks were off.

4894 Q. The front wheels were off the rail?

A. The two head wheels.

4895 Q. What caused that?

A. The jar from the other engine.

4896 Q. The impact with the other engine?

A. Yes sir.

4897 Q. What did the other engine do, did it go back after the impact, after the collision?

A. I think it started back a little bit.

Redirect examination by G. W. Berge:

4898 Q. Now, Mr. Hall, see if I understand you correct; you said a while ago about distances you weren't sure, and you may have testified at the Coroner's inquest when you first saw the approaching engine, you were three car lengths away?

A. That was at the Coroner's inquest.

4899 Q. Now when you were on the right side, you were leaning

out and looking, and when you first saw the approaching engine, it was three car lengths, about?

A. I don't know whether I said it was about that or what it was.

563 4900 Q. I want your recollection now?

A. My recollection was about three car lengths, I think that is my recollection.

4901 Q. Then you saw the other Engine?

A. Yes sir.

4902 Q. You actually saw it?

A. Yes sir.

4903 Q. Now, of course, immediately after the accident your memory was just as good or better than now, just as good anyhow?

A. Yes sir.

4904 Q. Now Judge Holmes has asked you about the speed you were going, I asked you nothing about that on direct examination, but I will now ask you, touching the question of speed, at the Coroner's inquest, if you were not asked this question, just to refresh your memory: Q. How fast were you going? And did you not answer the question: A. When he hit? Q. By the Coroner, "Yes sir", and your answer was: We were going about three miles an hour, I judge. Then Question again: About three miles an hour? Answer: Between two and one-half miles and three miles. And then again, Question: You had been going faster than that had you? Answer: I had been, yes sir. Question: When you saw that you were going to collide, how far were you apart when you first saw them? Answer: About three car lengths. Question: How fast were you going then? Answer: I was going about four miles, between three and four miles per hour.

A. I have no recollection of it.

4905 Q. You have stated to Judge Holmes that it never did stop before it hit the other engine, that is correct isn't it?

A. I didn't say that, I don't think.

564 4906 Q. Well now, to refresh your memory, at the Coroner's inquest, you stated that you were going between two and one-half and three miles an hour when you hit the other engine. If you so testified at that time, that would be correct?

Objected to as Counsel seeks to impeach his own witness. Overruled. Exception.

A. I didn't get the question.

4907 Q. If you did testify at the Coroner's inquest that when your engine hit the other engine, your engine was going two and one-half miles or three miles an hour, of course you gave your best recollections, if you did so testify?

A. I don't think I ever testified as to how fast the engines were going when they hit.

4908 Q. You don't think you did?

A. Not to my knowledge.

4909 Q. Well, I have read you as to what was certified to as your evidence by the Reporter, who took it at that time, and read from

it simply to refresh your memory, and ask you after having read it to you, whether that helps you to recollect more?

A. I stated that when I seen the other engine, I was going from two and one-half or three miles, now.

4910 Q. That is what you testify to now?

A. Isn't that what I testified to now?

4911 Q. Now you testified at the Coroner's inquest, that you were going about four miles an hour, between three and four?

A. Between three and four?

4912 Q. Yes sir, but you did testify at the Coroner's inquest, that when you hit the other engine, your engine was going two and one-half to three miles an hour?

A. Well as I said before, as to the speed the engine was going when they hit, I wouldn't say, because my head was in the snow, I was buried in the snow.

565 4913 Q. Then you wouldn't swear as to what speed your engine was going when you hit it?

A. No.

4914 Q. After Mr. Goiens yelled to you that "There they are" or whatever the language was, you won't swear that you did anything?

A. I will.

4915 Q. What will you say you did?

A. I threw the brakes in the emergency and reversed the lever in the back-up motion.

4916 Q. You had to stand up doing that?

A. I was standing up all the time, if I remember correctly.

4917 Q. Standing on the seat or on the step?

A. No, standing on the running board.

4918 Q. Well, that places you behind the window doesn't it?

A. Oh no, we have drop seat, where you can drop the seat down, you have got a running board then.

4919 Q. And still you say you yourself jumped out of the window, you are sure of that?

A. Yes sir.

4920 Q. You didn't go out of the usual place of going out?

A. No sir.

4921 Q. A switch engine that way, you don't have any conductor?

A. No sir.

4922 Q. You are the man who runs the whole crew, don't you?

A. No sir.

4923 Q. Who does?

A. Yard master.

4924 Q. Of course the Yard Master directs you, but you run the engine?

A. Yes sir.

4925 Q. The switchman or flagman, whatever you call them, they must do what you want done, must they not?

566 A. Not exactly, if the Yard Master is there, he is supposed to give all orders.

4926 Q. Well, the Yard Master don't accompany the engine?

A. Not at all times, but we are working under his orders.

4927 Q. You are working under his orders in the yard?

A. Yes sir.

Recross-examination by G. D. De Lacy:

4928 Q. Mr. Hall, where were you going when accident occurred?

A. Where to?

4929 Q. Yes.

A. Lincoln.

4930 Q. How did you happen to be going there?

A. We had been out to the Burlington transfer, and out to the University track.

4931 Q. Who told you to run the engine in there?

A. Yard Master.

4932 Q. Mr. Hall, the Yard Master don't have control of the engine, you run the engine?

A. I run the engine.

4933 Q. You obey his orders as to where to go?

A. Yes sir.

Redirect examination by G. W. Berge:

4934 Q. You were sent out to 27th street by the Yard Master, you say?

A. Yes sir.

4935 Q. And you were then on your way back?

A. We were sent out to 27th street by the Yard Master to the Burlington transfer.

4936 Q. And you were then on your way back when the collision occurred?

A. Yes sir.

G. W. HALL.

567 STATE OF NEBRASKA,  
*Jefferson County, ss:*

I, C. H. Denney, a Notary Public in and for said County and State, do hereby certify that E. E. McLane, L. H. Hinitt, D. F. Goiens and G. W. Hall were by me first severally duly sworn, to testify the truth, the whole truth and nothing but the truth, and that the deposition- by them respectively subscribed as above set forth, were taken down in short hand by Bertha Schultz, and by her reduced to typewriting, she being a person who is not interested in the suit, said depositions being taken down in short hand in the presence of the witnesses respectively and myself, and reduced to typewritin- in the absence of the witnesses as per stipulation, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice specified; that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit and said depositions were commenced at the time in said notice specified and completed on the same day as above stated.

In testimony whereof I have hereunto subscribed my name and attached my seal, this 23d day of February, 1911.

[NOTARIAL SEAL.]

C. H. DENNEY,  
*Notary Public.*

C. H. Denney, Jefferson County, Nebraska.

My commission expires July 8, 1915.

568 It now being 5-20 P. M., an adjournment was taken until tomorrow morning, at 9-30 A. M., March 21st, 1911.

9-30 a. m., March 21st, 1911.

Court met pursuant to adjournment and the following proceedings were had and done.

Mr. Holmes: If the Court please the defendant Company now asks permission to read the answer to which the Court sustained the plaintiff's objection found on page 23 of the evidence of Mr. Hall, and we do that for the reason that after the Court sustained the objection Mr. Berge in re-direct examination went ahead and brought out the matter, which would entitle us then to read this.

Mr. Berge: Let the record show that I brought out what I did bring out, it did not pertain to the same thing and related in the question, and I hesitated about reading it, but counsel for the railroad insisted that I should read it.

Mr. Holmes: Now, the facts are that I did not object and then he read it.

569 Mr. Berge: To save all possible doubt about it let him read it.

Mr. Holmes: I read from the testimony of Mr. Hall found on page 123 of his deposition as follows:

Deposition G. W. HALL here read by defendant.

*Questions Omitted in Former Examination.*

"Q. What was the speed of your engine at that time, the time you jumped?

A. I think I gave the speed in the Coroner's inquest as two and a half to three miles per hour.

Q. That is your judgment now, is it?

A. Yes sir."

Mr. Berge: The plaintiff objects to that, the other has been answered; the other has been read.

Mr. Holmes: The defendant Company now offers in evidence that part of Witness Hall's testimony found on page 125 of his deposition to which objection was sustained by the Court, the same now being competent, as cross examination, Mr. Berge having gone into the same on the re-direct.

Mr. Berge: The plaintiff objects to the offer as not cross examination and as an opinion and conclusion of the witness, no foundation laid, not a statement of any facts.

Sustained. The defendant excepts.

(Questions "G," "H," "I," and "J," here read to the jury; and copied as follows:)

"Have you run engines or trains through there since Mr. Wright was killed and since the semaphore was put in the curve?

Objected to as not proper re-direct examination, immaterial, irrelevant and incompetent.

570 G. W. Berge directs the records to show that he overlooked this part, and that it is not proper re-direct examination, but asks leave of the Court to now further ask a few questions in chief.

"A. I fired engines through there.

"Q. Have you observed the operations of that semaphore in there?

"Objected to as not proper re-direct examination, immaterial, irrelevant and incompetent.

"A. Yes sir.

"Q. Now, Mr. Witness, if you are going north, just as you were when Mr. Wright was killed, and if there is a train on the track, coming from the north southward, will the semaphore that is now there, indicate that there is a train on the track?

"Objected to as immaterial, irrelevant and incompetent, and not within the issues of this case.

"A. Yes.

"Q. State whether that semaphore is north or south of the viaduct?

"Objected to as immaterial, irrelevant and incompetent and not within the issues of this case.

"A. South of the viaduct, and there is one north of the viaduct."

Witness excused.

571 A. R. MITCHELL, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for the plaintiff:

4937 Q. Your name is Dr. A. R. Mitchell?

A. Yes sir.

4938 Q. And you are a physician and surgeon in this city?

A. Yes sir.

4939 Q. Been here a long time?

A. Sometime, yes sir.

4940 Q. Of course you are a regular licensed practicing physician?

A. Yes sir.

4941 Q. Doctor, on December 8th, 1909, you may state whether you were called to attend an injured man on the Rock Island road?

A. I have not looked up the date, Mr. Berge?

4942 Q. Well, I am not so particular about the date, about that time?

A. Yes sir.

4943 Q. Do you remember a circumstance when you overtook or met Dr. Stealman and the injured man in the automobile?

A. Yes sir.

4944 Q. Was that the first you saw him?

A. Yes sir.

4945 Q. Where did you meet them there?

A. I met them down about Vine street, I think.

4946 Q. Were you in the ambulance,—did you have an ambulance with you?

A. Yes sir.

4947 Q. And that is the first you saw of the injured man?

A. Yes sir.

572 4948 Q. Tell the jury whether you accompanied him to the hospital?

A. Yes sir.

4949 Q. To what hospital?

A. St. Elizabeth's.

4950 Q. And you may state until his death whether he was in your charge?

A. Yes sir.

4951 Q. I think Dr. Stealman, after he left you turned him over to you?

A. Yes sir.

4952 Q. And Dr. Stealman was not there after that, so far as you know?

A. Not that I know of, no sir.

4953 Q. Was he transferred from the automobile to the ambulance?

A. No sir.

4954 Q. Conveyed clear to the hospital in the automobile?

A. In the automobile, yes sir.

4955 Q. Did you assist or see him transferred from the automobile to the hospital?

A. Yes sir.

4956 Q. Could he walk?

A. No sir.

4957 Q. And Doctor, did you examine his injuries in the hospital?

A. Yes sir.

4958 Q. I wish you would describe to the jury what you found, if you can?

A. The injury was a sq-eezing injury to the abdomen, chiefly catching the soft parts between the back bone and the front muscles of the abdomen. There were no fractures but an injury of the internal parts, of the internal organs.

4959 Q. The injury was internal?

573 A. Yes sir.

4960 Q. Could you tell, Doctor, whether the injury was internal?

A. Yes sir.

4961 Q. Could you tell, Doctor, whether the squeezing was from side to side or from front to back?

A. No, not from the examination; I think the history of the case shows it was from side to side across in this way, (Indicating).

4962 Q. That is correct?

A. Yes sir.

4963 Q. And tell the jury what portion of the time from the time you arrived at the hospital until he died that you were with him?

A. I was with him several hours after he arrived at the hospital. Then I left my assistant, Dr. Hiltner, there while I went down town. Dr. Hiltner, was with him the rest of the time, I think.

4964 Q. Did you see him again before he died?

A. Not before he died, no sir.

4965 Q. Who was the doctor?

A. Dr. Hiltner, on that day.

4966 Q. What the internal injuries were you never did discover, did you?

A. Yes, the kidneys were injured, I know that because the bladder was full of blood.

4967 Q. Was there a post mortem examination?

A. No there was not.

4968 Q. Doctor, was he conscious?

A. Partially so, most of the time.

4969 Q. Where is Dr. Hiltner now?

A. He is here.

574 4970 Q. Do you know when he died?

A. I think he died that evening.

4971 Q. Well, Doctor, was there anything that could be done for him after you got him?

A. The man was in profound shock when he reached the hospital; he was cold and his pulse was rapid, and the general condition was such that it was impossible for them to attempt to at least bring on reaction so that it might be possible to do something further for him, but reaction never occurred.

4972 Q. It never did?

A. No sir.

4973 Q. And profound shock, as you call it, does that produce unconsciousness?

A. Not always, no sir.

4974 Q. Q. And you say reaction did not recur. What do you mean by that, the pulse and the temperature?

A. The temperature was below normal body heat, that is, was below normal; the pulse never came up. the surface of the body never became warm; he was not in condition that he could be operated on.

4975 Q. Everything that could be done was done for him?

A. I thought so, yes sir.

4976 Q. During the two hours that you were with him?

A. It might have been three hours or four. I am not certain about that. I stayed with him a good part of the afternoon.

4977 Q. Was there much that you could do for him?

A. Nothing but keep him warm, relieve his pain.

4978 Q. You say there was blood in the kidneys, to any extent?

A. Well, the blood of course, we discovered was in the bladder, we had to remove that, that was done by catheterization.

575 4979 Q. Did you have to administer anaesthetics?

A. No, we could not do that, it was very unsafe.

4980 Q. He was a stranger to you?

A. Yes sir.

Witness excused.

576 CHARLES R. MAWE, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for plaintiff:

4981 Q. State your full name?

A. Charles R. Mawe.

4982 Q. M-a-w-n?

A. M-a-w-e.

4983 Q. And what official position do you hold in the city?

A. Deputy city clerk.

4984 Q. And how long have you be-n deputy?

A. Nearly two years.

4985 Q. Mr. Mawe, have you the ordinance with you or could you turn to it, defining the city limits?

A. I could.

4986 Q. You have it?

A. Yes sir.

4987 Q. You may state whether you have a plat of the city in your pocket?

A. I have.

4988 Q. Let me see it?

A. (City map identified as exhibit "20".)

4989 Q. Is exhibit "20", what is it?

A. That defines the limits of the city and divides the wards and precincts.

4990 Q. It divides the wards?

A. Yes; likewise describing the city limits.

4991 Q. Is that an accurate map of the city, showing the boundaries?

A. Yes sir, it is gotten up by the city engineer.

4992 Q. Do you know where the Holdrege street viaduct is?

577 A. Yes sir.

4993 Q. Is that in the city limits?

A. It is.

4994 Q. How far beyond that?

A. How far beyond that the city limits extend?

4995 Q. Yes?

A. To state exactly in the number of feet, I could not do so, first,

because the Rock Island right-of-way—their right-of-way is irregular; for the reason they bought up lots—

Mr. Holmes: The defendant moves to strike that out as not responsive to the question.

4996 Q. Well, the city limits about?

Court: The motion is *to* too broad. State what you said.

Mr. Holmes: The defendant moves to strike out that part that the Rock Island *bouth* and the track is irregular, as not responsive.

4997 Q. I mean, about how far beyond the Holdrege street viaduct does the city limits extend approximately?

A. About 450 to 500 feet.

4998 Q. Does exhibit "20" show the Holdrege street viaduct, the place where it is?

A. Shows where it is, yes sir.

4999 Q. Shows where it crosses Holdrege street?

A. Yes sir.

5000 Q. Can you indicate it on the exhibit?

A. I think so, right across on 18th street, (Indicating), right across there.

5001 Q. Does the Rock Island cross Holdrege street at 18th?

A. Well, about that.

578 5002 Q. Well, now, so far as the city limits is concerned, will you show to the jury on this exhibit, trace your pencil around on this exhibit?

A. Here is the north side of the B. & M. track extending out in this direction, following these red lines across here.

(By Mr. Holmes:)

5003 Q. What is this direction, what point?

A. This point away out here?

5004 Q. Yes?

A. I could not state exactly.

5005 Q. 27th street?

A. It must be out beyond 27th street, it is a long way out. I think that is 33rd.

5006 Q. The city limits goes to 33rd street.

A. (Not answered.)

(By Mr. Berge:)

5007 Q. 33rd east, and how far north is that point?

A. I am not acquainted with all those streets out here, it is way north of Pitcher street.

5008 Q. You may state whether the city limits runs north to the north line of the Burlington right-of-way?

A. Yes sir.

5009 Q. And is all of the Rock Island right-of-way eastward to 33rd street in the city limits?

A. Yes sir.

5010 Q. This witness hesitates to let this exhibit go. I will admit

that from the depot in the city of Lincoln to 33rd street, the Rock Island runs in the city of Lincoln.

Mr. Berge: The plaintiff will not offer this exhibit "20".

Exhibit "20" withdrawn.

Witness excused.

579 JAMES B. PALMER, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for the plaintiff:

5011 Q. What is your full name?

A. James B. Palmer.

5012 Q. Mr. Palmer, what is your occupation?

A. Locomotive engineer.

5013 Q. At the present time?

A. At the present time, yes sir.

5014 Q. For what road?

A. Rock Island.

5015 Q. Are you running now?

A. 1211.

5016 Q. What is that, a freight engine?

A. A switch engine in the Lincoln yards.

5017 Q. Is that the only switch engine in the Lincoln yards?

A. That is the only Rock Island switch engine.

5018 Q. How long have you been running that switch engine?

A. Since yesterday morning.

5019 Q. How long have you been an engineer?

A. Well, something over three years.

5020 Q. And what road?

A. Norfolk & Western, Louisville & Nashville, and Rock Island.

5021 Q. How long for the Rock Island?

A. Since the 14th of last September.

5022 Q. And you say since yesterday you have run this engine?

A. Since yesterday morning, I have been on this engine.

5023 Q. Where before that?

580 A. Out at Fairbury on road service.

5024 Q. Road service, freight trains?

A. Freight train, yes sir.

5025 Q. Are you familiar with the action of the engine, and steam and brakes and reverse lever, and etc.?

A. I am.

5026 Q. You say you have been in how long?

A. Well, over three years.

5027 Q. I wish you would tell the jury,—I suppose an engine, alone, without any train,—you have brakes on the engine?

A. Yes sir.

5028 Q. Tell the jury whether there is a separate lever for that?

A. Yes sir.

5029 Q. For the brakes alone?

A. Yes sir, a separate lever.

5030 Q. So far as the steam is concerned, is there a separate throttle or lever for that?

A. Yes sir.

5031 Q. So far as any propular phrase, we hear it said, that a man reverses his engine, what lever does he do that with?

A. Well, that is some help in stopping the engine.

5032 Q. Is it a separate lever, too?

A. Separate from the brakes.

5033 Q. Is it a separate one from turning on or off the steam?

A. Yes sir.

5034 Q. Now, Mr. Palmer, suppose an engineer desires to stop his engine just as quickly as he possibly could, tell the jury what he would do?

A. Well, in the first place you want to shut your steam off, and if necessary reverse the engine.

5035 Q. If necessary the thing you want to do is to get the steam off first and put on the brakes?

A. That is the idea.

5036 Q. That is done with separate levers?

A. Yes sir.

5037 Q. And you say if necessary to what?

A. Reverse your engine.

5038 Q. What does that mean?

A. Well, that is a lever we are just speaking of that regulates the steam to your cylinders. This lever in one motion moves the engine ahead; the opposite motion moves the engine in an opposite direction.

5039 Q. Now, suppose you had the steam shut off and also had the brakes on and you reverse your engine, that means that the steam is applied the other way?

A. In the opposite direction to what you were working the steam.

5040 Q. If the brakes were not on *were not* on the engine runs backwards?

A. Yes sir.

— Q. And then though they were on, might it run backwards?

A. Well, it will have a tendency to stop the engine much quicker, if the whole lever is reversed, the——

5041 Q. Suppose the whole lever is reversed, the whole engine is reversed, does that mean that the full reverse steam is on?

A. That just reverses the steam in the opposite direction.

5042 Q. The full measure of the steam?

A. Yes sir.

5043 Q. When you run and engine, do you run her with all the steam turned on?

A. Oh, no, not in all cases.

5044 Q. When you reverse the lever is all the steam turned on backwards?

A. You reverse your lever, you open your throttles, the steam is regulated by the throttlet and you reverse your engine and open the throttle, that just reverses the steam in the cylinders of the engine.

5045 Q. The engine will run backwards?

A. Yes sir.

5046 Q. Mr. Palmer, take an engine without any cars, of course not including the coal car, that is a part of the engine, the water tank?

A. Yes.

5047 Q. If I would say to you that the engine was running ten miles an hour along on the track, and the engineer did everything he could to stop the engine, just as soon as he could do the things that you have testified to?

A. Yes.

5048 Q. Could you tell approximately, not exactly of course, but approximately, could you tell, answer "yes" or "no", how far you would run before the engine would stop?

A. You cannot.

Mr. Holmes: The defendant objects as incompetent, irrelevant, and immaterial, the question does not reflect the testimony in this case, and there is no foundation for the same.

A. (continued). Well, in answer to his question, you cannot.

Court: The objection is overruled.

The defendant excepts.

583 A. (continued). No, you cannot.

5049 Q. Is there a way of telling how far you would run before you would stop at different rates of speed?

A. Yes, you can tell how far you have gone.

5050 Q. But going, let me say five miles an hour, do you know how far you would run before you would stop, be able to stop?

A. No sir, that depends upon the grade of the road.

5051 Q. Well, what do you mean by the grade of the road?

A. Well, in case you are going up hill you can stop in a shorter distance than you can down hill.

5052 Q. Suppose it was on the level, could you tell approximately?

A. No, you could not tell just what distance you are going to stop in.

5053 Q. Could not tell?

A. No sir; you could not tell right to the,—going five miles an hour.

5054 Q. Can't you tell as an engineer?

A. No sir; I can tell about, but I could not tell exactly.

5055 Q. You know my question was not exactly, it was "about"?

A. Well, I could come pretty close, yes.

5056 Q. Well, that is what I mean. Does a curve make any difference?

A. Well, yes, you can stop quicker on a curve than you can on a straight line.

5057 Q. That is, owing to the binding of the wheels?

A. Yes, to the binding of the rails.

5058 Q. Against the rails. Are you familiar with the curve and cut out here at Holdrege street?

A. Yes sir.

5059 Q. Is that about level out there?

584 A. No, it is a grade, some grade around through there.

5060 Q. Which way is that grade?

A. Going east.

5061 Q. Yes, it is higher northward?

A. Higher northward—eastward.

5062 Q. North or east?

A. Yes sir.

5063 Q. Well, it curves and goes east?

A. Yes sir.

5064 Q. But right under the viaduct it goes pretty nearly north?

A. Well, yes.

5065 Q. Under the viaduct that we will say 300 or 400 feet along there, is it up-grade from this way?

A. Yes sir.

5066 Q. Up hill?

A. Yes, a little up hill.

5067 Q. How much?

A. I could not hardly answer that question.

5068 Q. You have been over it?

A. Yes, I have been over it quite a number of times.

5069 Q. You are familiar with it?

A. Very well.

5070 Q. Now, is there much difference between a curve and a straight track, as to the distance you can stop an engine?

A. Well, not so much with a light engine.

5071 Q. Can you stop a light engine quicker than you can a heavy engine?

A. Well, that depends upon the brake.

5072 Q. Well, generally, assuming the brake is all right?

A. Well, no, there is no difference in that.

585 5073 Q. Well, you can stop one engine about as quick as the other?

A. About as quick as the other, yes sir.

5074 Q. Now, does it make much difference in stopping an engine at the speed, say of five or ten miles an hour, in that curve, that I have told you from the viaduct on northward, whether you were running north or running south?

A. Well, yes, you could stop an engine going east quicker than you could coming west.

5075 Q. Some quicker.

A. Yes sir.

5076 Q. Were you familiar with engine 1220?

A. 1220, yes; very well, I have run 1220.

5077 Q. How?

A. I have run that engine.

5078 Q. Then you are familiar with it?

A. Yes sir.

5079 Q. Where is the engine now?

A. Well, it is working out of Fairbury, I think on the Hebron branch.

5080 Q. A regular freight engine?

A. I think, yes sir.

5081 Q. Is that engine larger than 1220—the one you are running now, 1221?

A. The same engine as to size.

5082 Q. A Switch engine made out of a regular freight engine?

A. Yes, I think.

5083 Q. Now, we will take 1220, you say you are familiar with that engine?

A. Yes sir.

586 5084 Q. And you have run it?

A. Yes sir.

5085 Q. And run it on the road?

A. Yes sir.

5086 Q. Without any cars except the engine and coal car, three or four or five hundred feet beyond the viaduct coming this way, we will say, first running at the rate of five miles an hour, and suppose the engineer undertakes and does all he can to stop it just as quickly as he can, about how far will he run from the time he tries until he does stop?

A. What rate of speed were you giving?

5087 Q. Five miles?

A. Ought to stop in 20 feet.

5088 Q. Now, suppose he was running ten miles an hour, what do you say then?

A. Well, if it was running ten miles an hour and the brakes were all right and everything was favorable, I would stop in 30 feet.

5089 Q. That is in that cut, there?

A. Yes sir.

5090 Q. That is, you would do it by applying the reverse lever and shutting off the steam, and putting on the brakes?

A. Yes sir.

5091 Q. About 30 feet, at ten miles an hour.

A. Yes sir.

5092 Q. If you were going 15 miles an hour under like circumstances?

A. Well, I would not stop in quite as short a distance.

5093 Q. Well, fix it in feet, approximately, fix it in feet, Mr Palmer?

A. Well, say 45 feet.

587 5094 Q. And we will say 20 miles an hour?

A. Well, if the brakes were working all right and everything favorable, at the rate of 20 miles an hour you could hardly stop a light engine under 60 feet.

5095 Q. Supposing you were going three miles an hour?

A. Well, at three miles an hour you can stop very handy at 15 or 20 feet. It is very slow.

5096 Q. 18 or 20 feet, three miles an hour, yes, about the distance from here to the wall over there?

A. Something like it.

5097 Q. Were you familiar with engine 1486?

A. I am not.

5098 Q. But — said there was not much difference in the weight of the engines as to the ability to stop it?

A. Well, that don't have so very much to do with it, the weight of the engine.

5099 Q. Now, we will take it in that same cut, Mr. Palmer, northward from the viaduct, assuming now that the engine is running ten miles an hour and everything was done by the engineer to stop it, how far would she run?

A. Well, ten miles an hour ought to stop it in about 45 feet.

5100 Q. An engine similar to 1220. And what do you say to running five miles an hour?

A. Five miles an hour, would stop at 20 feet.

5101 Q. Running three miles an hour?

A. Well, you will go 20 feet by the time you get everything ready and get your brake on, 20 feet.

5102 Q. Running 20 miles an hour?

A. If everything is favorable, ought to stop in 60 feet.

5103 Q. You don't make much difference, then in that, 588 in running either northward or southward?

A. We are in the opposite direction now to what we were?

5104 Q. But do you make any difference much?

A. Yes, make a difference in the up hill and down hill.

5105 Q. Stop a little quicker?

A. A little quicker up hill.

5106 Q. You have not given much difference in your feet, here, in stops, you have given some?

A. Well, if you were going east, you ought to stop in five feet shorter distance with the engine than you can down hill on this grade through this curve.

5017 Q. Do you know, how much would you state it — mathematical language or surveyor's language about the grade there, is there any way of telling?

A. I could not.

5108 Q. Of course, as an engineer you know it is a little up grade?

A. Yes sir.

5109 Q. Mr. Palmer, going northward, I think you call it eastward?

A. Yes sir.

5110 Q. From this side of the viaduct before you go under through it, have you observed the pillars or posts under that viaduct, how near they come over to the track, or the engine as you go under it?

A. Yes sir.

5111 Q. Pretty close, are they?

A. Well, they are not inside the standard. I don't think.

5112 Q. I don't know what the standard is. As you are coming from the south going northwards, those posts, state whether they

are in the way as to seeing through under the viaduct, suppose you are south of them a hundred or two hundred feet?

589 A. I cannot say with that bridge, I have really never noticed whether that bridge affects your seeing around through that curve in there.

5113 Q. You have not noticed. Before you were on this switch engine yesterday, would you run from Fairbury to Council Bluffs frequently?

A. Sometimes, yes sir.

5114. Q. Well, about how generally?

A. Well, not very often, I have only been over there once, I think in the last 30 days.

5115 Q. How much in the last six months?

A. Well, the most of my work has been on the Horton branch since I have been working for this Company.

5116 Q. Your trips this way, then, have not been as frequent as they have the other way?

A. No sir.

5117 Q. Would you say half a dozen times in the last six months?

A. Yes sir.

5118 Q. More than that?

A. Well, yes, more than that.

5119 Q. A dozen times?

A. Well, no, I don't think quite a dozen times.

5120 Q. Mr. Palmer, an engine g-ing rapidly, say ten miles an hour, you apply the brakes and reverse the engine and shut off the steam, does the engine skid on the track?

A. Well, they do sometimes, not in all cases.

5121 Q. That is the wheels slide?

A. The wheels slide.

590 Cross-examination.

Examined by Mr. Holmes for the defendant:

5122 Q. Mr. Palmer, if I understand you right there is a lever with which you turn on the steam and turn it off?

A. Yes sir.

5123 Q. Then there is what is known as the "reverse lever"?

A. Yes.

5124 Q. Which reverses the action of the steam in the steam chest and causes the engine to go in the opposite direction?

A. Yes sir.

5125 Q. Now, supposing an engine going east through the Holdrege street viaduct, I will ask you first, can you turn on this reverse, both at the same time, can you reverse your engine and turn on the steam at the same time?

A. No, it is not all done with the same lever; there is separate levers.

5126 Q. You have to turn one lever to cut off the steam, and then turn another lever to reverse it?

A. Yes, that is it.

5127 Q. Then is there another lever where you turn on the air?

A. Yes, you have a brake-valve for that.

5128 Q. You have a *barke*-valve?

A. Yes sir.

5129 Q. So, if an engineer wanted to do anything that was necessary to stop his engine immediately, he would work the three levers?

A. Yes sir.

5130 Q. Turn off the steam?

A. Yes sir.

591 5131 Q. Turn on the air?

A. Yes sir.

5132 Q. And use the reverse lever?

A. Yes sir.

5133 Q. Now it would be necessary, wouldn't it, to turn off the steam?

A. Yes sir.

5134 Q. Now, supposing an engine coming from the south under the viaduct to Holdrege street, how far can you see from the Holdrege street viaduct from the north side of it, or the east side of it?

Mr. Berge: The plaintiff objects as not cross examination, no foundation laid.

Overruled. The plaintiff excepts.

5135 Q. How far could you see?

A. Coming west?

5136 Q. No sir, going east?

A. Right from the viaduct,—well, you can see quite aways around there, I could not say just how far.

5137 Q. Well, how far?

A. Well, I am not right sure about it.

5138 Q. Well, will you approximate it?

Mr. Berge: The plaintiff objects he said he don't know, unless he measures it.

Overruled. The plaintiff excepts.

5139 Q. Give us your best judgment?

A. Well, now, as far as I can remember you can see 100 yards around there to be sure of it.

592 5140 Q. Now, Mr. Palmer, supposing an engine going east and you can see that distance and it does not stop within that length of distance, you say it was going more than ten miles an hour, if everything was done to stop it?

Mr. Berge: The plaintiff objects as incompetent, irrelevant and immaterial, and not proper cross examination, and calling for a conclusion and opinion, it is not a statement of facts.

Overruled. The plaintiff excepts.

A. I don't just understand you.

5141 Q. If an engineer of an engine going east can see the distance of 300 feet or 200 feet and does not stop his engine within

150 feet, would you then,—and he does everything in his power to stop his engine, would you then say he was going at a greater speed than ten miles an hour?

Mr. Berge: The plaintiff objects as incompetent, irrelevant and immaterial, not proper cross examination, no foundation laid, and calling for an opinion and conclusion of the witness, and not a statement of any facts.

Overruled. The plaintiff excepts.

A. Well, I would not say that he did.

5142 Q. You would not. Suppose he could not stop, what would you say, would you say that he was going at a greater rate of speed than ten miles an hour?

Mr. Berge: The plaintiff objects as not cross examination, and calling for an opinion and conclusion of the witness, not a statement of any facts, no foundation laid.

Overruled. The plaintiff excepts.

593 A. Well, it does look like he would be running over ten miles an hour.

5143 Q. Now, Mr. Palmer, supposing an engineer going eastward strikes and engine coming west at a distance of about 150 feet north of the viaduct or east of the viaduct and after it strikes, it goes backward, goes towards the city of Lincoln, then comes forward again, what would you say as an expert and as an engineer, as to the brakes being set, as to the reverse lever being turned?

Mr. Berge: The plaintiff objects as not cross examination, not being competent.

Overruled. The plaintiff excepts.

A. Well, it seems that the steam was not shut off of the engine.

5144 Q. Well, is it possible for an engine to go ahead, Mr. Palmer, with the reverse lever on?

A. Well, that don't look possible, without he was using steam.

5145 Q. I did not hear you?

A. It don't look possible if an engine was going ahead, and not backwards, on that grade.

5146 Q. It could be knocked backward?

A. Yes, but I don't see how it should go ahead.

5147 Q. If it should come forward again would that indicate that the reverse lever had not been put on?

Mr. Berge: The plaintiff objects as not being cross examination, incompetent, irrelevant and immaterial, the witness on direct examination was asked only expert questions and nothing else.

594 Overruled. The plaintiff excepts.

A. Yes, it would.

5148 Q. It would come forward?

A. Yes.

5149 Q. When you put the reverse lever on that puts it in back motion?

A. Yes sir.

5150 Q. Then will you please explain how the engine could come forward again, with the back lever on?

A. It cannot come forward.

5151 Q. No. Then, Mr. Palmer, that would indicate to your mind that the back motion had not been put on, wouldn't it?

A. Yes sir.

5152 Q. And it would further indicate to you as an engineer that the steam had not been cut off, wouldn't it?

A. Yes sir.

5153 Q. And that is the only way you explain the movement of the engine in the manner in which I have indicated?

A. Yes sir.

5154 Q. Now, Mr. Palmer, supposing that the switch engine was coming from the east and it was at the most abrupt point on that curve from the Holdrege street viaduct, and the minute it observed the obstruction on the track, of the engine approaching from the south, it stopped within 25 feet, what speed would you say that switch engine was going?

Mr. Berge: The plaintiff objects as not cross examination, not properly reflecting the evidence in this case, and incompetent.

Overruled. The plaintiff excepts.

A. Your question was, what speed she was going?

595 5155 Q. Yes, if the switch engine did stop the minute she did observe the obstruction within 25 feet?

A. Well, if she had been going ten miles an hour she could have stopped in that distance.

5156 Q. If it had been going ten miles an hour?

A. Yes sir.

5157 Q. Supposing it stopped within 15 feet, what rate of speed would you say it was going?

Mr. Berge: The plaintiff objects as not cross-examination, not properly reflecting the evidence in this case.

Overruled. The plaintiff excepts.

A. Well, if it had been going five miles an hour it would have stopped in fifteen feet.

5158 Q. Then, Mr. Palmer, as I understand you, if one engine stopped within the distance of 15 feet, it was going no greater rate of speed than five miles an hour?

A. What was the question, how was that again?

5159 Q. That is what you say, isn't it?

A. Yes sir.

5160 Q. Now, then, you say further if an engine going east did not stop within 150 feet it was going a greater rate of speed than ten miles an hour?

Mr. Berge: The plaintiff objects as not cross-examination, not properly reflecting the evidence in this case.

Overruled. The plaintiff excepts.

A. Yes sir.

596 Redirect examination.

Examined by Mr. Berge for plaintiff:

5161 Q. Now, supposing around that curve the engine coming from the north, from the time it commences to stop, or tries to stop, runs 125 feet before it stops, how many miles would you say it was going per hour, if everything was done to stop it as you have indicated?

Mr. Holmes: The defendant objects as not re-direct examination, no sufficient foundation laid, for introducing expert testimony on that subject and not reflecting the testimony on the part of the plaintiff.

Overruled. The defendant excepts.

A. Do you say how fast was he going?

5162 Q. Yes, if the engine is coming from the northward southward towards the depot on the north side of that viaduct, two or three or four hundred feet, to have tried to stop her and they run 125 feet before she gets stop-, how fast do you say she was going per hour?

Mr. Holmes: The defendant objects as not re-direct examination, no sufficient foundation laid, for introducing expert testimony on that subject and not reflecting the testimony on the part of the plaintiff.

Overruled. The defendant excepts.

A. Well, I could not hardly say just how fast he was running and everything favorable.

597 5163 Q. Well, now you have testified, now give me your best judgment?

Mr. Holmes: The defendant objects for the further reason that it is not proper re-direct examination, the witness having already answered that he could not say.

Overruled. The defendant excepts.

Mr. Holmes: The defendant further objects as not redirect examination, no sufficient foundation laid for introducing expert testimony on that subject and not reflecting the testimony on the part of the plaintiff.

Overruled. The defendant excepts.

A. Well, it looks like he must have been running something like 35 or 40 miles an hour.

5164 Q. Suppose the engine coming from the south going northward stoppes at 50 feet, how fast would you say she was going per hour?

A. A light engine?

5165 Q. Yes?

A. Well, he was going 20 miles an hour, or 25 miles an hour.

5166 Q. At 50 feet?

A. Yes sir.

5167 Q. Suppose she stops at 25 feet?

A. Well, something like 20 miles an hour.

5168 Q. At 25, stops, in 25?

A. No, he could not have been running quite that fast. I will say 15 miles an hour, or 12 miles an hour.

5169 Q. Suppose she was running five miles an hour how far would she run before she would stop?

A. 15 feet, ought to stop at five miles an hour in 15 feet if everything is favorable.

5170 Q. Now, when you reverse an engine can you sit up and do it?

A. Yes sir.

5171 Q. Well, you sit down here and lean and look out, suppose we are going southward where is that lever?

A. Right by your side.

5172 Q. If you were going southward here looking out the window, the lever would be to your right side?

A. To the left side.

5173 Q. Over here to the left side?

A. Yes sir.

5174 Q. Would you sit down or stand up?

A. Some engines you can sit down and handle very well.

5175 Q. How is it with 1220?

A. Well, you can reverse them sitting.

5176 Q. And suppose she is going south, and the entrance is right back of you here, where you could step out?

A. Yes.

5177 Q. You can step right back and jump out, can't you?

A. Yes sir.

5178 Q. When you want to stop an engine what is the first thing you do?

A. Shut off steam.

5179 Q. Where is the lever?

A. Up in the top of the boiler.

5180 Q. Can you set that, do that?

A. Yes sir.

5181 Q. What is the next?

A. The lever?

5182 Q. Where is it?

A. In some engines down here, (Indicating).

5183 Q. Where was 1220's?

A. On the boiler-head.

5184 Q. Where did you reach up?

A. With the left hand.

5185 Q. After taking hold of this, (Indicating) you reach up there (Indicating)?

A. Yes sir.

5186 Q. Where is the reverse lever of 1220; at the left hand side, over here? (Indicating.)

A. Yes, you pull it backwards to reverse it.

5187 Q. You say you do that?

A. You can, yes sir.

5188 Q. How is it usually done to advantage?

A. Well, switching, anything like that, to stand up.

5189 Q. When you sit down the lever projects as high as your head?

A. Something like as high as your head.

5190 Q. You get a better pull at it to stand up?

A. Yes sir.

5191 Q. They pull pretty hard?

A. Sometimes they do.

5192 Q. You have just got to put your whole strength, to pull it back?

A. No, you don't have to exert yourself.

5193 Q. In pulling that back, don't you have to get back here when you get out of the entrance?

A. No sir.

600 5194 Q. You have to step down?

A. No sir.

5195 Q. It is on a level with the floor?

A. On a level with the floor right by your side in the cab of the engine.

5196 Q. You said you could see from the north side of the viaduct northward about how many feet, or yards, 300 yards, I think you said?

A. Right from the viaduct?

5197 Q. The north side of the viaduct, northward?

A. Yes sir.

5198 Q. 300 yards?

A. I think you can see something like, oh, something like 150 yards, something like that, around that curve there.

5199 Q. Oh, 100 yards, I think you said, that would be 300 feet. Well, now, if you go 100 yards north and look southward you could see just as far, can't you?

A. Yes sir.

5200 Q. I will hand you exhibit No. "6" and will ask you to look at it and ask you to state whether that is the way it looks if you were north of the viaduct about 400 feet looking towards the viaduct southward?

A. 100 feet.

5201 Q. No, 400 feet, suppose you are 400 feet beyond the viaduct north and looking southward towards the viaduct?

A. If you get back there 400 feet coming north, you can see the viaduct from the north side of the engine.

5202 Q. From which side of the engine?

A. From the north side of the engine.

601 5203 Q. From the north or west side?

A. Yes sir.

5204 Q. You cannot see the viaduct, but suppose you stand on the track and look down that way, you can see pretty near 400 feet from there?

A. Yes sir.

Mr. Holmes: The defendant moves to strike out the answer.

Sustained. The plaintiff excepts.

Mr. Holmes: The defendant objects to the question as incompetent, irrelevant and immaterial.

Overruled. The defendant excepts.

A. Yes sir.

5205 Q. But you say a man sitting on that seat of the engine can see?

A. Not 400 feet from the viaduct.

5206 Q. Suppose a man stands on the front foot-board, the west side, you can see, couldn't you?

A. You can see, yes sir.

5207 Q. But if he stands on the rear-foot-board, he could see, if he looks out?

A. If he is on the inside of the curve.

5208 Q. Yes?

A. Yes sir.

5209 Q. And if you are on the inside of the curve, the engine coming from the north southward, can see just as far down the track as the man down the track can see up the track?

A. Yes sir.

5210 Q. Now, suppose, Mr. Palmer, there is a man standing on the rear foot-board of the engine, coming from the north southward, where he can see on the inside of the curve down and suppose  
602 the very first minute he can see an engine approaching from the south northward, the engine is 50 feet north of the viaduct, and then suppose the collision takes place 100 feet, about, north of the viaduct, which engine would you say was running the fastest?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, not a subject of expert testimony and does not effect the evidence of this case offered by the plaintiff and also calling for a conclusion of the witness and for the further reason that it is impossible for an expert to give an opinion upon that subject.

Sustained. The plaintiff excepts.

Witness excused.

603 E. C. HURD, being produced and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Berge for the plaintiff:

5211 Q. Your name is E. C. Hurd?

A. Yes sir.

5212 Q. Mr. Hurd, what official position do you occupy in connection with the State Railway Commission?

A. The engineer in charge of physical valuation.

5213 Q. The engineer in charge of the physical valuation of all the roads in the state?

A. Yes sir.

5214 Q. A civil engineer?

A. Yes sir.

5215 Q. Have you ever been a locomotive engineer?

A. I never have.

5216 Q. What is your occupation and has it been in recent years?

A. Construction, maintenance and somewhat the operation of railroads.

5217 Q. Give the jury just a general idea, not too long of your experience along that line?

A. Well, I virtually began when I was 22 years of age, left College and have followed under those lines ever since, with several Companies, the Great Northern, the Iowa Central, The so called Allied Lines in Ohio, which was a combination of four trunk lines buildings and property, in Michigan at Pierre Marquette, and in Nebraska with the so called O. L. & B.

5218 Q. In Lincoln the White Line?

A. No, the O. L. & B.

5219 Q. During all that time a civil engineer?

A. Yes sir.

604 5220 Q. Does that involve the construction of railroads and road beds, and etc.?

A. Yes sir.

5221 Q. Now, so far as construction of railroads is concerned, does that involve construction, and how tracks should be laid, and etc.?

A. Yes sir.

5222 Q. It is the engineering work of the construction of the road?

A. Yes sir.

5223 Q. Now, Mr. Hurd, are you familiar with the use of semaphores on railroads and the purposes of them and what they will do in the line of prevention of accidents; the purposes of them whether there was any there or not?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, not within the issues of this case, and the absence of the semaphore would be a risk assumed by the decedent under the evidence in this case, he having a knowledge of the same.

Sustained. The plaintiff excepts.

5224 Q. You may state where in sharp curves or cuts with embankments on each side and approaching engines towards each other, if you can't see only 200 or 300 feet on the main line, you may state whether or not semaphores are in common use in well regulated roads in the country?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, not within the issues of this case.

Sustained. The plaintiff excepts.

605 5225 Q. Mr. Hurd, you may explain the operation of trains and how they are run where semaphores are built along the lines or in cuts?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues of this case.

Sustained. The plaintiff excepts.

Mr. Berge: I offer to show by the witness that the semaphore or semaphores in this particular cut involved in this suit,—that the system of its operation would absolutely prevent accidents or collisions in this cut, if properly constructed. I also offer to show by the witness that on all well regulated railroads in this country that in places of this kind of the nature and character of this cut that semaphores are invariably in use and that they would and do in all circumstances absolutely prevent collisions in cuts of this character.

Mr. Holmes: The defendant excepts as incompetent, irrelevant and immaterial, and for the further reason that the decedent assumed any risks of the absence of any semaphore having knowledge of the condition surrounding the place where the accident happened, and not within the issues of this lawsuit.

Sustained. The plaintiff excepts.

Witness excused.

606 GEORGE W. BERGE, being produced and duly sworn on behalf of the plaintiff testified as follows:

Examined by Mr. Berge for the plaintiff:

5226 Q. You may state whether you have examined the plat in the Register of Deeds' office showing the width, the depth of the lots immediately east of the Rock Island road and north of the Holdrege street viaduct?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, shedding no light upon the controversy in this case.

A. I have.

5227 Q. State how deep the lots are immediately east of the Rock Island track and north of the Holdrege street viaduct?

Mr. Holmes: The defendant objects as incompetent, irrelevant and immaterial, shedding no light upon the controversy in this case.

Court: If that objection not the best evidence it would be good.

Mr. Holmes: Don't want to object on that ground.

Overruled. The defendant excepts.

A. The lot is 135 feet north and south.

Mr. Holmes: The defendant moves to strike out the question and answer of the plaintiff for the reasons they are immaterial, incompetent and not within the issues of this controversy, it sheds no light in this case.

Overruled. The defendant excepts.

Witness excused.

607 Mrs. LIZZIE L. WRIGHT, being produced and duly sworn on behalf of the plaintiff testified as follows:

Examined by Mr. Berge for the plaintiff:

5228 Q. Where do y-u live?

A. Denver, 1825 Emerson street.

5229 Q. Give us your full name, Mrs. Wright?

A. Lizzie L. Wright.

5230 Q. And where do you live?

A. Denver, Colorado.

5231 Q. That is your home now?

A. Yes sir.

5232 Q. And when did you move there?

A. April 10th.

5233 Q. It has been your residence ever since?

A. Yes sir.

5234 Q. Was Otto O. Wright your husband?

A. Yes sir.

5235 Q. Are you one of the administrators or the administratrix of this estate?

A. Yes sir.

5236 Q. And H. C. Berge is the other?

A. Yes sir.

5237 Q. You were appointed administratrix?

A. Yes sir.

5238 Q. And qualified and are acting as administratrix of the estate of Otto O. Wright?

A. Yes sir.

5239 Q. Mrs. Wright, how old was your husband at the time of his death?

A. 32 years.

5240 Q. 32?

608 A. Yes sir.

5241 Q. Tell, the jury whether he was a man in good health or otherwise?

A. He was.

5242 Q. The photograph here offered in evidence, that is his photograph, is it?

A. Yes sir.

5243 Q. Was that his appearance shortly prior to his death?

A. Yes, two months.

5244 Q. This was taken, you say, this exhibit, two months before his death?

A. About two months.

5245 Q. What I mean is, he was a man in good health, was he?

A. Yes sir.

5246 Q. How long had you been married, Mrs. Wright?

A. Do you mean at the time of his death?

5247 Q. Yes?

A. Nine years the November before.

5248 Q. Was you here, Mrs. Wright, at the time of his death, before he died?

A. No sir.

5249 Q. When did you get here?

A. I got here at 5 P. M. the day he died, he died at 9-45 the morning before I arrived.

5250 Q. And you got here in the afternoon?

A. Yes sir.

5251 Q. And where did you find him?

A. Castle Roper & Mathews' Undertaking Parlors.

5252 Q. And where did you take him?

A. Parsons, Kansas.

609 5253 Q. And buried him there?

A. Yes sir.

5254 Q. Mrs. Wright, what was his occupation?

A. Engineer.

5255 Q. Was he a railroad man during the whole time that you had been married to him?

A. Yes, not engineering all this time.

5256 Q. Tell the jury, say for several years prior to his death, how much he earned per month?

A. At an average of \$150, between \$125 and \$150 a month.

5257 Q. Between \$125 and \$150 a month?

A. Yes sir.

5258 Q. What did he do with his money?

A. Well, he would keep out just enough for running expenses and then give me all the rest.

5259 Q. Had you any children?

A. No sir.

5260 Q. And prior to his death you got all of your support from him?

A. Yes sir.

5261 Q. Dependent on him, were you?

A. Yes sir.

5262 Q. What are you doing now, Mrs. Wright?

Mr. Holmes: The defendant objects as immaterial.

Sustained. The plaintiff excepts.

5263 Q. Do you have to work for a living now?

Mr. Holmes: The defendant objects as immaterial.

Sustained. The plaintiff excepts.

5264 Q. You say Mr. Wright was 32 years old?

A. At the time of his death.

5265 Q. Mor- or less, was he past 32 or not quite 32?

610 A. He was 32 the February before.

5266 Q. He would have been 33 February 10th?

A. Yes sir.

## Cross-examination.

Examined by Mr. Holmes for defendant:

5267 Q. Letter identified as exhibit "21."

5268 Q. Mrs. Wright, handing you exhibit "21," and "part of "21," I will ask you if that is your signature, is that your signature?

Mr. Berge: The plaintiff objects as not cross examination.  
Overruled. The plaintiff excepts.

A. Yes sir.

Witness excused

611 Mr. Berge: I offer in evidence so much of the Carlisle Table of Expectancy of Life as shows the expectancy of a man 33 years of age, and the table shows that his expectancy is 32 years and a fraction.

Mr. Berge: Now if the Court please, I ask now as a part of the Plaintiff's case that the jury be permitted to inspect the place of the collision and ask that the Court make an order directing them to go to the scene and under the direction of the ba-liff inspect it as a part of Plaintiff's case.

Mr. Berge: I think, your Honor, with that, unless my mind has slipped a cog I think we read.

Mr. Holmes: I would like to consult a little before we join in the request of the examination, I would like to consult with the Court as to the advisability of that and whether tests with the engine can be made and we need not do it right now, just, reserve any ruling upon his request.

Court: All right. Do you rest then?

Mr. Berge: Yes, with that exception.

Court: Yes, I understand.

The plaintiff rests.

Court: Gentlemen of the jury they have got a matter they want to present to the Court so I will excuse you until 2 o'clock.

612 In the mean time you will bear in mind what I have said to you about talking about this case and about forming or expressing an opinion until you have heard the entire law-suit,—  
2 o'clock.—The jury retire.

Mr. Holmes: The plaintiffs having closed *their* evidence and rested *their* case, comes now the defendant Company and moves the Court to direct a verdict in favor of the defendant and against the plaintiff for the following reasons to-wit:

1. The evidence of the plaintiff is insufficient upon which to base a verdict against the defendant.

2. The evidence of the Plaintiff fails to establish any act or acts of negligence on the part of the defendant Company whereby any verdict for damages against the defendant could be based.

3. For the reason that the evidence of the plaintiff shows that it was the gross negligence of the plaintiff's decedent that resulted in his death.

4. That the plaintiff's evidence established the fact that it was the negligence of the plaintiff's decedent that was the approximate cause of the plaintiff's decedent's death.

5. That the evidence is so far as the fact that the death of the plaintiff's decedent was caused by no act of negligence on the part of said defendant Company or that of its employees, but was the result of the decedent's neglectful violation of rules promulgated and published by defendant Company, and of which the decedent had knowledge and which rules were so promulgated and published by the defendant Company for the purpose of protecting the safety of its passengers and its employees.

6. That the evidence establishes the fact to be that had plaintiff's decedent obeyed all of the rules of said defendant Company governing the operation of its engines, and of which decedent had knowledge, and more especially rule 16 of time table 11-D, and rule 97-A of the Book of Rules, the accident complained of by plaintiff's decedent met his death could not have occurred.

7. For the reason that there is no evidence of negligence on the part of the defendant Company and hence no question of comparative negligence arising or can be submitted to the jury.

8. For the reason that under the evidence offered by the plaintiff there is no question of fact to be submitted to the jury where by the jury could base a verdict against the defendant Company.

9. For the further reason that from the evidence of the plaintiff, as a matter of law the plaintiff's action will not lie against the defendant Company.

Overruled. The defendant excepts.

It now being 12 o'clock M., March 21st, Court adjourned until 2 P. M. same day.

2 o'clock p. m., March 21st, 1911.

Court met pursuant to adjournment and the following proceedings were had and done.

*Defendant's Testimony.*

G. W. HALL being produced and duly sworn on behalf of the defendant testified as follows.

By Mr. Delacy for the defendant:

Q. Where do you live?

A. Fairbury, Nebraska.

Q. Speak quite loud Mr. Hall so we can hear you. You may state your name and place of residence to the jury?

A. G. W. Hall, Fairbury, Nebraska.

Q. Are you living in Fairbury now?

A. Why my family is there.

5272 Q. Are you employed by the defendant company at this time?

A. No, sir.

5273 Q. Where were you working on December 8, 1909?

A. I was working in Lincoln, Nebraska.

5274 Q. For what company?

A. The Rock Island.

5275 Q. And in what capacity?

A. Engineer.

5276 Q. On what engine?

A. 1220.

5277 Q. Is that the local switch engine?

A. Yes, sir.

5278 Q. You were engineer on the local switch engine in the Lincoln yards?

A. Yes, sir.

5279 Q. And who was your fireman?

A. Mr. Goines.

5280 Q. And you were under the yard master were you Mr. Carr, subject to his orders?

A. Yes, sir.

5281 Q. Operated your engine where he directed you to operate it?

A. Yes, sir.

616 5282 Q. Now you recall the accident that occurred on that day do you not?

A. Yes, sir.

5283 Q. Now prior to that time—prior to the accident, where had you been?

A. We had been out to the B. & M. transfer and over on the University track.

5284 Q. Is that east of the viaduct?

A. Yes, sir.

5285 Q. And east of the place where the accident occurred?

A. Yes, sir.

5286 Q. About what time had you gone over there?

A. By Mr. Berge: Plaintiff objects to the question as incompetent, irrelevant and immaterial not proving any issue in this case and this being the same witness that was examined and cross examined by counsel in the depositions already — to the jury; simply going over this whole territory again.

Sustained.

Exception.

5287 Q. Had you started in coming towards Lincoln at the time of the accident?

A. We had.

5288 Q. Coming from the east towards the Holdrege street bridge?

A. Yes, sir.

5289 Q. You had met Mr. Carr out there had you?

A. Yes, sir.

5290 Q. And he had told you that there was a light engine at the depot?

A. Yes, sir.

5291 A. Now you may state at what rate of speed, or how you came from 27th street toward this Holdrege street bridge?

Plaintiff objects as incompetent, irrelevant and immaterial calling for a conclusion and opinion of the witness not stating any  
617 fact no foundation laid, proving no issue in the case.

A. Well I should judge about 15 miles an hour until we came to the cut.

5292 Q. And then what did you do?

Plaintiff objects as incompetent, irrelevant and immaterial already examined into by this witness by the same attorneys and proving no issue in the case, no foundation laid.

Overruled.

Exception.

A. I reduced the speed to about three miles an hour.

5293 Q. Had you turned off your steam or shut off your steam?

A. Yes, sir.

Plaintiff objects as leading and suggestive not stating the facts, already gone over in his examination before in the deposition- read to the jury.

By the Court: He has already given his answer now.

By Mr. Delacy: What is your answer?

A. Yes, sir.

5294 Q. What do you call it when the engine is running without any steam on, what is the term?

A. Drifting.

5295 Q. And were you drifting down through this cut?

A. Yes, sir.

5296 Q. With the steam entirely cut off?

A. Yes, sir.

Plaintiff objects as leading and suggestive.

5297 Q. Now when first did you know of the approach of engine 1486?

Plaintiff objects as having already been fully testified to by this same witness in the depositions read to the jury and cross examination by the same attorneys.

Sustained.

Exception.

By Mr. Delacy: The defendant offers to show that he first learned of the approach of engine 1486 when the fireman called out  
618 to him: "There she comes", or something to that effect.

Plaintiff objects as having already been fully testified to by this same witness in the depositions read to the jury and cross examination by the same attorneys.

Sustained.

Exception.

5298 Q. How did you know of the approach of engine 1486?

Plaintiff objects as having already been fully testified to by this same witness in the depositions read to the jury and cross-examination by the same attorneys.

Sustained.

Exception.

By Mr. Delacy: The defendant offers to prove that he knew of the approach of engine 1486 because of the fireman Goines crying out: "There she comes" or: "There she is", and that that was the first time he knew of the approach of 1486.

Plaintiff objects as having already been fully testified to by this same witness in the depositions read to the jury and cross-examination by the same attorneys.

Sustained.

Exception.

5299 Q. When first you learned of the approach of engine 1486, what did you do?

Plaintiff objects as having already been fully testified to by this same witness in the depositions read to the jury and cross-examination by the same attorneys.

Sustained.

Exception.

By Mr. Delacy: Defendant offers to prove that when the witness,—at the first instant he learned of the approach of engine 1486, he applied his air and reversed his engine and did all in his power to stop the engine instantly.

Plaintiff objects as having already been fully testified to by this same witness in the depositions read *read* to the jury and  
619 cross-examination by the same attorneys.

Sustained.

Exception.

5300 Q. Now I will ask you Mr. Witness when you first learned of the approach of 1486 did you reverse the engine, throw the air into the emergency and do everything within your power to stop the engine?

Plaintiff objects to the question as incompetent, irrelevant and immaterial, leading, suggestive and having been fully gone into by this same witness in depositions already read to the jury.

Sustained.

Exception.

By Mr. Delacy: The defendant offers to prove by this witness that at the very instant he discovered the approach of 1486 he threw the air into the emergency and put his engine in back motion and did everything in his power to stop the engine instantly.

Plaintiff objects as *im*competent, irrelevant and immaterial, leading, suggestive and having been fully gone into by this same witness in depositions already read to the jury.

5301 Q. Now Mr. Witness, or Mr. Hall, after the collision of these two engines what was done with engine 1220?

A. We brought it into Lincoln.

5302 Q. Who brought it in?

A. I did.

5303 Q. Now was you the engineer that drove it in?

A. Yes, sir.

5304 Q. Now what did you have to do before you could start your engine, when you was taking it into Lincoln?

A. Had to release my brakes.

5305 Q. Did you have to release your brakes?

A. Yes, sir.

5306 Q. Where they set?

620 A. Yes, sir.

Plaintiff objects as leading and suggestive.

By the Court: He has already answered.

5307 Q. You may tell the jury whether after the accident your brakes were set?

Plaintiff objects as already answered.

Sustained.

Exception.

By Mr. Delacy: Defendant offers to prove that immediately after the accident the brakes were set and it was necessary to release the brakes before he could take the engine into Lincoln.

Plaintiff objects as already answered.

Sustained.

Exception.

5308 Q. Now Mr. Hall you may tell the jury whether or not prior to this accident when your engine was running through the cut, the bell on your engine was ringing?

Plaintiff objects as already answered.

Overruled.

Exception.

A. It was.

5309 Q. Did you have an automatic bell ringer on that engine?

A. Yes, sir.

5310 Q. And was it in motion or in operation?

A. No, sir.

5311 Q. Who was ringing the bell?

A. The fireman.

5312 Q. Now Mr. Hall I will ask you if it is possible for a man riding on an engine in operation to hear the bell on another engine coming towards the engine you are on, at say a distance of 100 feet?

Plaintiff objects as incompetent no proper or sufficient foundation laid.

Overruled.

Exception.

621 A. Not if your own bell is ringing and the noise of your engine, you can not hear a bell very far off on another engine.

5313 Q. About how far off would you say you could hear one?

Plaintiff objects as incompetent, irrelevant and immaterial no proper or sufficient foundation laid.

Overruled.

Exception.

A. Well I should judge you could hear a bell one hundred feet, maybe one hundred fifty.

5314 Q. Does the engine in operation make considerable noise?

A. Yes, sir.

5315 Q. What are those noises?

A. Well you take the bell alone it is making as much noise as the other engine's bell and the rattle of the engine will naturally drown the noise.

5316 Q. And how about the steam, does that make any noise?

A. Yes, sir.

5317 Q. And how about the rattling of the wheels on the track?

A. The wheels and the shoveling sheet, and the deck and everything, loose, it makes it impossible to hear the noise of another engine or the bell of another engine very far.

5318 Q. The noises of the operation of the engine, render it almost impossible, does it not?

Plaintiff objects as leading and suggestive and assuming a conclusion of the witness (question withdrawn).

5319 Q. You may state whether or not it is possible for an engine in operation to hear the bell of another engine coming towards them on a track for any considerable distance at all?

Plaintiff objects as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness no proper or sufficient foundation laid.

Overruled.

Exception.

A. No sir it is not.

5320 Q. Does the working of the exhaust on the locomotive make some noise?

622 A. The exhaust of the pump would make quite a good deal of noise.

5321 Q. And that of course would impede the possibility of hearing another bell, would it not?

A. Yes, sir.

5322 Q. Tell the jury whether on this day you heard any bell ringing on 1486?

A. I did not.

5323 Q. Did you hear any whistle blown?

A. No, sir.

5324 Q. When you first saw engine 1486, Mr. Hall, you may tell the jury whether or not if you know it was working steam?

Plaintiff objects to the question for the reason it is incompetent and on his examination in the depositions read to the jury he stated that he did not see the engine before he jumped.

Overruled.

Exception.

A. The engine looked to me as though she was working steam from the way she was throwing smoke out of the stack.

5325 Q. The engine was moving toward your engine was it not?

A. She was.

5326 Q. You may tell the jury from what you saw whether the engine 1486 was coming faster than your engine or not?

Plaintiff objects as incompetent, irrelevant and immaterial calling for an opinion and conclusion of the witness no proper or sufficient foundation laid, not a statement of any facts, gone over before in this examination in the depositions read.

Overruled.

Exception.

A. Well as to that I was not in a position where I could tell the speed that she was going but from all indications she was.

5327 Q. Did you notice whether or not the speed of engine 1486 was slackened before the collision?

623 Plaintiff objects as leading suggestive, calling for an opinion and conclusion of the witness no proper or sufficient foundation laid already gone into in these depositions.

Overruled.

Exception.

A. No, sir, I could not tell as to that.

5328 Q. How long have you been an engineer?

A. About a year and eight months, I think it was.

5329 Q. Previous to that time had you been a fireman?

A. Yes, sir.

5330 Q. And had been engaged in railroading, how long?

A. About eight years.

5331 Q. Do you know what the term: "Under full control" means?

A. I do.

5332 Q. Tell the jury what that is?

A. Under full control is to be able to stop within the distance that you can see the track is clear.

5333 Q. Now I will ask you Mr. Hall if on December 8 immediately prior to the accident you had your engine under full control?

Plaintiff objects as incompetent calling for an opinion and conclusion of the witness no foundation laid, fully gone into in the depositions.

Sustained.

Exception.

5334 Q. I will ask you Mr. Hall if you were able or if you could have immediately before the accident on December 8, have stopped your engine within the distance that the track was clear?

Plaintiff objects as incompetent, irrelevant and immaterial calling for an opinion and conclusion of the witness.

Sustained.

Exception.

5335 Q. I will ask you if you did do it?

Plaintiff objects as incompetent, irrelevant and immaterial calling for an opinion and conclusion of the witness.

Overruled.

Exception.

A. If I did?

5336 Q. Yes?

624 A. Stop her?

5337 Q. Within the distance that the track was clear?

A. She was stopped within less than the distance that I could see the track was clear.

5338 Q. You did?

A. She was I say.

5339 Q. Well I don't understand your last answer you say she was stopped within less than the distance that you could see the track was clear?

A. I mean that the engines hit before she had gone the distance that I could see the track was clear.

By Mr. Delacy: The defendant offers to show that immediately before the accident you had your engine in full control?

Plaintiff objects as incompetent, irrelevant and immaterial calling for an opinion and conclusion of the witness invading the province of the jury.

Sustained.

Exception.

By Mr. DeLacy: The defendant offers to show that immediately before the accident on Dec. 8 1909 engineer Hall had his engine under full control.

Plaintiff objects as incompetent, irrelevant and immaterial calling for an opinion and conclusion of the witness invading the province of the jury.

Sustained.

Exception.

5341 Q. At what time was it Mr. Hall, that you started to take your engine into Lincoln after the accident?

A. Why I could not tell as to that I don't remember, although I think it was about four o'clock or four-thirty something like that.

5342 Q. And at that time you say your brakes were set and you had to release them?

Plaintiff objects as already answered and leading and suggestive.

Sustained.

Exception.

625 5343 Q. Did you take the engine to Fairbury?

A. No, sir.

5344 Q. Where was the engine taken if you know?

A. From here?

5345 Q. Yes after the accident?

A. It was taken to Horton, I think, I am not sure.

## Cross-examination.

By Mr. Berge for the plaintiff:

5346 Q. You say that you are not in the employ of the defendant railroad now?

A. I am not.

5347 Q. Mr. De Lacy asked you whether you stopped your engine in the distance the track was clear and I understood you to say that the collision took place within that distance?

A. Yes, sir.

5348 Q. How?

A. Took place within the distance?

5349 Q. Yes the collision took place within the distance or inside of the distance where you could see the track?

A. Yes, sir.

5350 Q. And you were sitting on the west side of this engine. Will you tell the jury how far you could see down the track with that curve swinging to the left?

A. I should judge about three car lengths.

5351 Q. Could you do that without leaning away out?

A. No I had my head out at the side of the window.

5352 Q. Are you familiar with that right of way out there?

A. Yes, sir.

5353 Q. I will show you exhibit No. 6 and will ask you to look at it and I will say to you that that is a photograph about 400 feet or more north of the viaduct looking southwards towards the viaduct?

626 A. Yes, sir.

Defendant objects to that form of the question because there is no proof in substantiation of that fact.

By Mr. Berge: Well he has answered it.

5354 Q. Does that look the way that track does out there?

A. Well now as to that, I have not been over that particular piece of track since a little over a year ago, about a year ago.

5355 Q. You have not?

A. No, sir.

5356 Q. Did you ever go over this track after Mr. Wright was killed?

A. Oh yes, yes sir.

5357 Q. You say three car lengths, what kind of a car do you mean?

A. Well I mean an ordinary 36 foot car.

5358 Q. And when you went around that cut you understood that you could not see only about a hundred feet on that track?

A. I understood that the distance was very short.

5359 Q. Did you see the engine before the man on the footboard yelled to you?

A. I did not hear no one, on the footboard.

5360 Q. You did not?

A. No sir.

5361 Q. Do you know when your fireman jumped?

A. No sir I do not.

5362 Q. You do not?

A. I do not.

5363 Q. Well weren't you paying any attention to the men about you there, fireman or switchman or foreman?

A. I was working with the engine after the fireman hollered.

5364 Q. After the fireman did what?

A. Hollered to me.

5365 Q. Did he holler to you?

627 A. Yes, sir.

5366 Q. Well wasn't that the switchman who hollered to you?

A. No, sir.

5367 Q. Did you, do you swear the fireman hollered to you?

A. Yes, sir.

5368 Q. What did he say?

A. Sir?

5369 Q. What did he say?

A. He says: Here they are, or there they are, something like that.

5370 Q. You knew who "they" was, what "they" referred to, you knew it was this extra?

A. I thought it was.

5371 Q. Yes you was expecting it?

A. I was expecting it in a way. Yes I was told to look out for it, which we were doing.

5372 Q. You knew it was likely to come around that curve?

A. Yes, sir.

5373 Q. Can you tell on the photograph exhibit 6 where you were when the fireman hollered to you?

A. No, sir, I could not.

5374 Q. You could not?

A. No, sir.

5375 Q. Can you tell on photograph 8—

Defendant objects as not cross examination.

Sustained.

Exception.

5376 Q. You say that the collision took place in a shorter distance that you could have stopped the engine?

Defendant objects as having been already asked and answered since this witness has been on the stand.

By the Court: He has not been cross-examined on that but that was not what we said though Mr. Berge.

628 5377 Q. You say your automatic apparatus on that bell was not in *in* working order that day?

Defendant objects as misquoting the witness.

(Question withdrawn.)

5378 Q. Was the automatic ringer working that day?

A. It was not working, no sir.

5379 Q. That is what I mean?

A. Yes, sir.

5380 Q. It had an automatic ringer, did it?

A. It did.

5381 Q. But you were not using it?

A. No, sir.

5382 Q. Of course you would not undertake to say anything about how 1486 was running could you?

A. I could not tell as to the speed, no sir.

5383 Q. The very minute you saw her you did what you say you did and jumped off as quick as you could.

Defendant objects as incompetent and immaterial not cross-examination.

Redirect examination.

By Mr. De Lacy:

5384 Q. In answer to Mr. Berge's question you said you were looking out for 1486, or were told to look out for 1486. I will ask you if you were looking out for 1486?

A. We were looking out for anything that might happen around the curve.

5385 Q. Now I will ask you whether or not it was possible to ring the bell without using the automatic bell to ring it?

A. It is.

5386 Q. What do they have to ring it?

A. The fireman on the seat can ring it.

629 5387 Q. What did it have, a rope?

A. A cord.

5388 Q. This engine had a bell cord attached to the bell?

A. Yes, sir.

5389 Q. That is what the fireman was pulling just before the accident?

A. Yes, sir.

5390 Q. That was all the time going through the cut?

A. Yes, sir.

5391 Q. Now Mr. Berge asked you if you could tell how 1486 was running. I will ask you to tell the jury whether 1486 was running under full control or not?

Plaintiff objects as not proper re-direct and calling for an opinion and conclusion of the witness, no foundation laid.

Sustained.

Exception.

By Mr. DeLacy: The defendant company offers to show by the witness that the engine 1486 when first he saw it was not running under full control.

Plaintiff objects as not proper re-direct and calling for an opinion and conclusion of the witness, no foundation laid.

Sustained.

Exception.

5392 Q. I will ask you Mr. Hall whether it is possible if two engines are approaching each other under full control and both engines are in perfect working order and both engineers immediately upon seeing the other engine, apply all the instrumentalities there to stopping their engines, whether it is possible for the two engines to come together or collide?

Plaintiff objects as not properly reflecting the evidence in this case not proper re-direct incompetent nothing about the curve or anything taken into account.

Overruled.

Exception.

A. It is not.

630 5393 Q. It is not possible?

A. No, sir.

5394 Q. And that would be true if the two engines would be going around that curve out there by Holdrege street, would it?

A. That would apply to any place.

5395 Q. Now you told that your engine stopped within the distance that you could see the tracks clear. Just explain more fully to the jury what you mean by that?

A. I don't exactly understand that question. What I mean by it is that she stopped before she had got to the length of the distance where I could see that the track was clear at the time that I seen this other engine.

5396 Q. She had come to a stop had she?

A. Yes, sir.

5397 Q. You had the right of way there that day, did you Mr. Hall, over every train except first class trains, did you I mean?

Plaintiff objects as leading suggestive calling for an opinion and conclusion of the witness not the best evidence, no foundation laid, the rules and the time tables are the best evidence.

Overruled.

Exception.

A. Our train has the right any place within yard limits, only on passenger trains or first class train's time.

5398 Q. And it is their duty to look out for you?

Plaintiff objects as leading, suggestive, already answered.

Sustained.

Exception.

Recross-examination.

By Mr. Berge for the plaintiff:

5399 Q. Now you say under control means as far as you can see the track clear?

A. Yes, sir.

631 5400 Q. Well if there is a man on your front foot-board or on the rear foot-board on the inside, I mean on the east side, on the inside?

A. Yes.

5401 Q. You can see across there just as far as the man at the farther point looking this way, can't you?

The Defendant objects as not proper re-direct. Sustained. Exception.

5402 Q. If a man that day on your engine had been on the front foot-board, he could have seen farther than you could have seen, couldn't he?

Defendant objects as incompetent, irrelevant and immaterial calling for a conclusion of the witness not proper cross-examination. Sustained. Exception.

5403 Q. Was there any man on the front foot-board that day?

Defendant objects as not cross examination. Sustained. Exception.

5404 Q. You say that two engines both running under control facing each other running we will say at the same rate of speed around that curve, you think that they could both stop before a collision takes place, do you?

A. If they were under control.

5405 Q. And at the same time running the full limit as the rule allows to be able to stop in the distance they can see?

Defendant objects as incompetent, immaterial, not cross examination. Overruled. Exception.

By Mr. Berge: Question withdrawn. I will ask another question.

5406 Q. If both engines are running so that they can stop, the distance that they can see, but, suppose they could not stop only just within the distance they could see and running towards each other, under that rule is there a possibility of averting a  
632 collision?

Defendant objects as incompetent, irrelevant and immaterial not cross examination. Overruled. Exception.

A. Well there is not any rule in regard to that, only under control.

5407 Q. But now then if you are running in a distance you can see the space, the speed is so much that you could just stop on this side of the line where you could see, when you are starting, suppose you are running that way, you are running under control, aren't you?

A. Yes, sir.

5408 Q. Suppose the man running the other way, he is running under control too isn't he?

A. If he is under control himself.

5409 Q. Suppose he is running northward and suppose he can see two hundred feet and he does all he can to stop it and just suppose on this side of two hundred feet of the two hundred feet

line, he is running under control, isn't he if he can see that far on the track when he starts, isn't he?

A. Yes, sir.

5410 Q. Now is there a possibility of averting a collision under that rule if two engines are running towards each other in that cut, running under control but still running so fast that they can just stop within the space they can see,—there is bound to be a collision.

A. Well not exactly, I don't think. There is two crews there, each one can see so far around the cut.

5411 Q. You think under that rule there would be a possibility of averting a collision.

A. I think so.

5412 Q. Well the man who stands on the rear foot board  
633 or on the front foot board on the inside, he can see just as far as the man coming from the other way, can't he?

Defendant objects as not cross examination, incompetent, irrelevant and immaterial.

#### Redirect examination.

By Mr. De Lacy for the defendant:

5413 Q. Mr. Berge has asked if the two engines approaching each other were both under full control if it would not be impossible to avert a collision, now I will ask you Mr. Hall if they are both running towards each other under full control would it be possible to have a collision if they both did all they could to stop?

Plaintiff objects as not proper re-direct and gone into in his examination before. Overruled. Exception.

A. No sir, if you are running under full control there is no possible chance for a collision.

5414 Q. Yes and that would be true as to both engines would it not and at that place out there?

A. Yes, sir.

#### Recross-examination.

By Mr. Berge:

5415 Q. Now Mr. Hall suppose this is the curve here (indicating) you can see from here to here?

A. Yes, sir.

5416 Q. On the inside?

A. Yes, sir.

5417 Q. That man over there can see the same distance, can't he? (indicating).

A. I am on this side.

634 5418 Q. Yes, this is north and this is south. If there is a man on the front foot-board on the inside or on the rear foot board, he can see from here to here, and that is so, this man can see from here to here, can't he (indicating)?

A. Yes if there is a man there.

5419 Q. Suppose instead of the engine being there there is an embankment road down, there is an obstruction behind there?

A. Yes.

5420 Q. If you were coming around there and running at such a speed, and stopping the engine in here (indicating), and did your level best to stop it and just averted a collision, you would be running under full control, wouldn't you?

A. Yes, sir.

5421 Q. Now instead of that embankment rolling down, suppose that had been an engine showed up there, running this way, while you were going that way, wouldn't you have a collision while you were getting down there?

A. According to the railroad rules—

By Mr. Holmes: Object because the question does not reflect the evidence and show the distance that can be seen there. Overruled. Exception.

Defendant objects for the further reason that the diagram on the floor cannot be placed in the record and the defendant cannot properly get a record, and he has exceptions to it.

5422 Q. You don't understand the question?

A. Well I don't know until I hear it again.

5423 Q. Let me put it this way. Suppose around that curve a man coming from the south can see two hundred feet northward; now then we will say from the one side of the viaduct, now when you show up going northward on the north side of the  
635 viaduct there is an obstruction on the track two hundred feet north, not an engine but a great big log laying across there, you see it and you do your level best the very moment you see it in stopping your engine and succeeded just the moment before you came up to the obstruction, you were running under control, weren't you, according to the rules?

A. Yes, sir.

5424 Q. Now suppose you start two hundred feet north where that obstruction is, and you are running southward and you see right under the viaduct, the north side of it, not an engine but a great big log laying across, or some other obstruction, and you reverse your engine and do everything you can to stop it, and you succeed in stopping it just two feet before you reach the obstruction, you were running under control, weren't you under the rule?

A. Yes, sir.

5425 Q. That is correct.

A. Yes, sir.

5426 Q. Now suppose in the place of those two obstructions there are two engines running towards each other and when you are running southward two hundred feet north of the viaduct you look southward right under the viaduct, you are two hundred feet away, you see an engine coming towards you running at the same rate of speed that you are, and we will assume that they are both running just so that they could both stop within the distance you

could see, you would have a collision just half way distant wouldn't you?

Defendant objects as incompetent, irrelevant and immaterial not cross examination and does not fairly reflect the testimony in this case; they were not running at the same speed. Overruled. Exception.

A. Well I don't understand that question exactly.

636 5427 Q. (The question is read.)

A. Well now I would not be able to say as to that.

Redirect examination.

By Mr. De Lacy for defendant:

5428 Q. If they would both be running under control they would be both running at such a rate of speed that they would be able to stop before they collided?

A. If they both were under control they would be able to stop within a less distance than they could see that the track is clear.

5429 Q. And this rule is made to govern the approach of engines on the track isn't it?

A. Yes, sir.

5430 Q. And engines approaching each other?

A. Yes, sir.

5431 Q. And it means that both engines must be running at such a rate of speed so that they can both stop before they can collide when each sees the other?

Plaintiff objects as leading suggestive not proper re-direct. Sustained. Exception.

5432 Q. What does that mean Mr. Hall tell the jury?

Plaintiff objects he has explained what under full control means, not proper re-direct and a matter of calling for a conclusion, gone into in his deposition and already answered. Overruled. Exception.

A. I don't know what the question was.

5433 Q. Well I will put it again. What does the term running under full control mean when applied—

Plaintiff objects as fully answered already by the witness. Sustained. Exception.

637 5434 Q. —when applied to two engines approaching each other on the same track?

Plaintiff objects as incompetent, irrelevant and immaterial not proper re-direct and already been answered, the rule under full control has been explained by the witness, not only now but in his deposition, already read to the jury. Sustained. Exception.

By Mr. De Lacy: The defendant company offers to prove by the witness that the term running under full control when applied to two engines approaching each other on the same track means that

the two engines must be running at such a rate of speed that they are both able to stop and avert a collision.

Plaintiff objects as incompetent, irrelevant and immaterial not proper re-direct and already been answered, the rule under full control has been explained by the witness, not only now but in his deposition already read to the jury, and further as not the best evidence and no foundation laid for such evidence. Sustained. Exception.

Witness excused.

638 PHILIP EDDY being produced and duly sworn on behalf of the defendant testified as follows:

By Mr. Holmes for the defendant:

5435 Q. Where do you live?

A. In Lincoln, 2325 W Street.

5436 Q. How long have you lived in Lincoln?

A. About 23 or 24 years.

5437 Q. What is your business?

A. Switchman.

5438 Q. What?

A. Switchman.

5439 Q. For what railroad?

A. The Rock Island Railroad.

5440 Q. And how long have you been in the employ of the Rock Island Railroad Company?

A. Somewheres near thirteen years?

5441 Q. Thirteen years?

A. Yes, sir.

5442 Q. Where you ever engaged as a switchman in the Rock Island yards here in Lincoln?

A. Was I ever engaged.

5443 Q. What?

A. I am engaged in switching for the Rock Island at the present time.

5444 Q. You are at this time?

A. Yes, sir.

5445 Q. In the yards?

A. Yes, sir.

5446 Q. And how long have you been engaged in that particular work?

A. Somewheres near seven years.

5447 Q. Do you remember the 8th day of December, 1908, when Otto Wright was injured near the Holdrege street viaduct?

A. Yes, sir.

639 5448 Q. Where were you that day?

A. Riding on the back end of the engine.

5449 Q. On the back of the engine, on what engine?

A. The switch engine 1220, I believe.

5450 Q. Where had you been?

A. To the Burlington transfer, and from there to University Place.

5451 Q. And where were you going at the time of this accident?

A. Coming into town.

5452 Q. What time of day was it this accident occurred as near as you can recollect?

A. Well I could not say, somewhere in the afternoon between two and three somewhere there.

5453 Q. Between two and three?

A. Somewhere there, I would not say as to the time.

5454 Q. Who was with you on the switch engine?

A. Carr, Francisco and myself and the engineer and fireman.

5455 Q. There was six of you then on that engine. Who was your foreman?

A. Mr. Carr.

5456 Q. Were you aware that there was an extra in the yards?

A. Yes, sir.

5457 Q. Where did you find that out?

A. Mr. Carr told me it at 27th street.

5458 Q. And then you proceeded to go down into the yards at Lincoln?

A. Yes, sir.

5459 Q. Can you give us your best judgment as to the rate of speed you made from 27th street to the beginning of the cut?

A. No, I could not as to the rate of speed from 27th street into the cut.

5460 Q. After you reached the cut, did the rate of speed increase?

A. He pinched the engine up and held her down.

5461 Q. He what?

A. He applied his air and shut his engine down.

640 5462 Q. You now tell the jury Mr. Eddy how fast you were going after he applied the air and shut it down?

Plaintiff objects as an opinion and conclusion of the witness no foundation laid. Overruled. Exception.

A. I could not say.

5463 Q. What was the answer?

By Mr. Berge: He said he could not say.

5464 Q. Was there any further decrease of the switch engine 1220 after he applied the air?

Plaintiff objects as leading, suggestive, not stating any facts, assuming. Overruled. Exception.

A. Why I think there was.

5465 Q. What?

A. He kept coming down slower all the time.

5466 Q. He kept coming down lower all the time?

A. Slower.

5467 Q. And can you tell us now about where you were when you first had knowledge of the approach of the extra?

A. Well the first I knew was the man on the outside of the foot board hollered for me to get off.

5468 Q. Someone from the outside?

A. Yes, sir.

5469 Q. On which side was that?

A. On the left hand side of the engine.

5470 Q. What the man on the left hand side, on the inside of the curve?

A. Yes, sir.

5471 Q. And he tole you to get off?

A. Yes, sir.

5472 Q. And then did you step off, how did you get off?

A. I stepped off.

5473 Q. At the moment you stepped off, Mr. Eddy, how fast was that engine going, if you know?

641 Plaintiff objects as calling for an opinion and conclusion of the witness, incompetent, no sufficient foundation laid, he stated awhile ago he did not know, he could not say. Overruled. Exception.

A. Well I don't know as I paid much attention to getting off.

5474 Q. And you are not able to say now?

A. I would not say how fast it was going. No sir.

5475 Q. State what difficulty if any you had in getting off?

Plaintiff objects as leading, suggestive, assuming that he did have. Overruled. Exception.

A. Did not have any trouble at all?

5476 Q. Was the engine 1220 at the moment you stepped off moving slow or fast?

Plaintiff objects as leading, suggestive, incompetent, calling for an opinion and conclusion of the witness, no foundation laid. Overruled. Exception.

A. I think it was moving slow.

5477 Q. As you went down through the cut Mr. Eddy state what if you remember, what the engineer or the fireman was doing in his cab if you know?

Plaintiff objects as leading and suggestive and assuming. Overruled. Exception.

A. I could not tell you; I could not see the fireman at all.

5478 Q. Could you hear anything?

Plaintiff objects as leading and suggestive and assuming. Overruled. Exception.

A. No, sir.

5479 Q. Was the bell on 1220 ringing?

A. I think it was, yes, sir.

5480 Q. It was, could you hear, did you hear the bell, the whistle on the extra?

A. No, sir.

642 5481 Q. Did you see the approach of extra 1486?

A. No sir.

5482 Q. How far did your engine 1220 move after you stepped off?

A. Well I should judge about a car length.

5483 Q. A car length?

A. Yes sir.

5484 Q. Then was it struck by the other extra, by the extra?

A. They went together.

5485 Q. Did you see the extra strike the 1220?

A. Well I seen the dust of it.

5486 Q. What?

A. I seen the smoke and the dust of it.

5487 Q. Where were you standing at that time?

A. Standing just beside the track.

5488 Q. Not down far enough to see the approach?

A. No sir.

5489 Q. You could see the approach couldn't you from where you stood of the extra?

A. I could if I had time, but I did not have time.

5490 Q. The time was very short there?

A. Yes, sir.

5491 Q. Could you hear the train the extra approaching?

A. I did not.

5492 Q. You did not hear it?

A. No, sir.

5493 Q. Did you hear any application of air on your engine?

Plaintiff objects as leading and suggestive and assuming and incompetent.

Overruled. Exception.

A. Why I heard him apply his air at the east end of the big cut, as she came in.

5494 Q. I mean just before you stepped off?

A. Well I think I did, yes.

643 5495 Q. And then from the time you stepped off, from the time he applied his air and from the time you stepped off you think the engine moved its length ahead of you?

A. Yes, sir.

5496 Q. After the accident had occurred, did you observe anything about your engine 1220?

A. I did not, no sir.

5497 Q. You staid there all the time with your engine, did you?

A. No, sir.

5498 Q. Where did you go?

A. I went back to flag.

5499 Q. You went back east to flag an approaching train?

A. Yes, sir.

5500 Q. Do you remember how soon that train approached?

A. No I could not say, it was quite a while. I don't know just the time, nor how long it was.

5501 Q. What kind of a train was it you went back to flag?

A. A passenger train.

5502 Q. A regular train, a regular passenger?

A. Yes, sir.

5503 Q. Do you know its number?

A. 13.

5504 Q. You knew that train had not gone into Lincoln?

A. Yes, sir.

5505 Q. So then after the accident you immediately went back to flag?

A. Yes, sir.

5506 Q. Expecting the approach of that train?

A. Yes, sir.

5507 Q. And stood there?

A. Until I was told to come in.

5508 Q. Yes?

A. Yes.

644 Cross-examination.

By Mr. Berge for the plaintiff:

5509 Q. You say it was quite a while before it came?

A. Yes, sir.

5510 Q. You have been in those switch yards there for seven years?

A. Yes, sir.

5511 Q. And you are in there now?

A. Yes, sir.

5512 Q. A switchman all the time?

A. All the time.

5513 Q. And immediately after the collision you ran northward to guard incoming trains?

A. Yes, sir.

5514 Q. You did not go around at all where Mr. Wright was pinioned in?

A. I walked around there and simply said you better get a flag out and I went right straight back.

5515 Q. Are you clear about that whole transaction out there?

A. In what way?

5516 Q. Well all of the details of it?

A. Defendant objects to that form of question.

5517 Q. You said you thought the bell was ringing, that is the language you used?

A. Yes, sir.

5518 Q. How?

A. I believe that is what I said.

5519 Q. And that is the way you mean it?

A. Well a man on the hind end there, there is so much noise, you can't hardly tell.

5520 Q. You won't swear sir the bell was ringing?

A. No, sir.

5521 Q. And you said: "I think I felt the air being applied" about the time you got off, will you swear it was?

645 A. Yes, sir.

5522 Q. When you went into the cut?

A. At the east end of the cut he applied his air.

5523 Q. At the east end of the cut?

A. Yes, sir.

5524 Q. But I mean immediately before you got off, that was farther down this way?

A. I said just after I got off, didn't I?

5525 Q. Well you could not feel it just after you got off?

A. You can hear it.

5526 Q. You could hear it on the other engine, couldn't you?

A. No, sir.

5527 Q. What can you hear about the air going on?

A. You can hear the air applied.

5528 Q. What else can you hear, can you hear the steam? being shut off?

A. No, sir.

5529 Q. Can you hear the reverse lever going on when you are not on the engine?

Defendant objects as not cross-examination.

Sustained. Exception.

5530 Q. You say you could see the dirt and smoke of the collision?

A. Yes, sir.

5531 Q. You did not see the other engine approaching at all?

A. No, sir.

5532 Q. You were on the back of the foot board?

A. Yes, sir.

5533 Q. Four of you standing back there?

A. Yes, sir.

5534 Q. Nobody on the front foot board?

A. Nobody on the front foot board.

5535 Q. You don't know what the fireman and engineer were doing?

A. I could not say, no sir.

646 5536 Q. When McKinstry to the left of you told you to step or jump, did you just get off?

A. Yes, sir.

5537 Q. And that is all you know about that collision?

A. That is all.

5538 Q. —.

By Mr. Holmes: Objected to as not cross-examination.

By the Court: He has already answered.

By Mr. Holmes: Move to strike it out.

By the Court: Strike it out.

5539 Q. You saw Mr. Wright pinioned in there when you went around there?

A. I don't believe I did.

Defendant objects as not proper cross-examination.

By the Court: He has already answered.

5540 Q. You say the engine moved a car length after you got off?

A. Yes, sir.

5541 Q. Did McKinstry get off before you did?

A. Yes, sir.

5542 Q. How?

A. Yes, sir.

5543 Q. How much before?

A. Well I could not say how far.

5544 Q. Well when you just stepped off he was back here somewhere (indicating).

A. Well he was behind me, yes, sir.

5545 Q. Of course you did not measure that distance?

A. No, sir.

5546 Q. That is your judgment now?

A. Yes, sir.

5547 Q. And up to the time of the collision you had not seen 1486 at all, had you?

A. No, sir.

647 Redirect examination.

By Mr. Holmes for the defendant:

5548 Q. When they applied the air you heard the exhaust, didn't you?

A. The air.

5549 Q. You can hear that several car lengths can't you?

A. Yes, sir.

5550 Q. You don't have to feel it to know that it goes on?

A. No, sir.

5551 Q. And you heard it that morning or that afternoon?

A. Yes, sir.

By Mr. Berge:

5552 Q. You could hear the exhaust going on four or five car lengths away, can't you?

A. You can if you are working beside of them or anywhere near them.

Witness excused.

JOHN BELL being produced and duly sworn on behalf of the defendant testified as follows:

By Mr. Holmes for the defendant:

5553 Q. Mr. Bell where do you live?

A. Fairbury, Nebraska.

5554 Q. And what is your business?

A. Engineer.

5555 Q. Locomotive engineer?

A. Yes, sir.

5556 Q. And for what railroad did you work?

A. Rock Island.

5557 Q. How long have you been in the employ of the Rock Island?

A. Thirteen years.

5558 Q. How many?

A. Thirteen years.

5559 Q. During that thirteen years have you had occasion to run on this division between Fairbury and Council Bluffs?

648 5560 Q. —.

A. Why I worked about a year before I came here.

5561 Q. How is that?

A. One year before I came here, I have been twelve years out of Fairbury, between Fairbury and Council Bluffs.

5562 Q. And you have been running twelve years?

A. I have been running seven years.

5563 Q. You are familiar with the Lincoln yards?

A. Yes, sir.

5564 Q. And you are familiar with the curve and cut commencing just as you approach the Holdrege street viaduct?

A. Yes, sir.

5565 Q. Are you acquainted with the rules and regulations of the company in the operation of trains in the Lincoln yards?

A. Yes, sir.

5566 Q. Have you ever had occasion, Mr. Bell, to run extras through the Lincoln yards?

A. Yes, sir.

5567 Q. And have you run other trains, first and second class trains?

A. Yes, sir.

5568 Q. I will ask you, Mr. Bell, in running extras, for instance with a light engine through the Lincoln yards, what do the rules require of you?

Plaintiff objects to that question as incompetent, irrelevant and immaterial, not proving any issue in this case, not the best evidence, no foundation laid, the rules themselves are the best evidence, and an opinion and conclusion of the witness as to the construction of the rules, not a statement of the rules.

Sustained. Exception.

5569 Q. Are you acquainted with rule 16a in the time tables?

A. Yes, sir.

5570 Q. And also with rule 97a?

A. Yes, sir.

649 5571 Q. Now on the running of an extra train through the Lincoln yards, Mr. Bell, passing over and through the cut, I mentioned, could you operate an extra train through there?

Plaintiff objects to the question as incompetent, irrelevant and immaterial calling for an opinion and conclusion of the witness, what he would do and proving no issue in the case, and what any other engineer would do, not binding upon the plaintiff's intestate and cannot prove the rules by the practise of other engineers.

Sustained. Exception.

5572 Q. According to those rules, Mr. Bell, what are engineers required to do in passing through the Lincoln yards?

Plaintiff objects as incompetent, irrelevant and immaterial and the rules themselves being the best evidence, no foundation laid, calling for an opinion and conclusion of the witness.

Sustained. Exception.

5573 Q. Do you know Mr. Bell, what running under control means?

A. Yes, sir.

5574 Q. And what does it mean?

A. It means that you must be able to stop in the distance you can see ahead of the train.

5575 Q. Now in passing through this curve or cut what constitutes coming under control?

Plaintiff objects as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness, he already has stated what running under control means, and invading the province of the jury as to what would be under control in the cut or under the circumstances in this case.

Overruled. Exception.

A. Well if it is a cut you cannot see very far ahead of you and you get down in the distance you are able to stop and give the other fellow a chance to stop. It might be one mile an hour

650 and it might be five miles an hour.

5576 Q. You fix a maximum and minimum mile there?

A. No, sir, there ain't none there at all; some places you can see 200 feet ahead and some places you cannot see 75 feet ahead.

5577 Q. Then what is your duty?

A. Well it is much smaller.

Plaintiff objects and moves to strike it out; objects to the question as incompetent, irrelevant and immaterial and not a construction of the definition of what "under control" means, but simply an opinion of what a man ought to do and invading the province of the jury.

A. Well I don't understand now what you are driving at.

5578 Q. (Question read.)

A. The duty is to flag around it.

5579 Q. What do you mean by that Mr. Bell?

A. To go up there and send a man ahead of you to protect you.

5580 Q. And is that applicable to an extra?

Plaintiff objects as incompetent, irrelevant and immaterial, not the best evidence, the rules themselves being the rules governing engineers running through that cut, calling for an opinion and conclusion of the witness.

Overruled. Exception.

A. Yes, sir.

5581 Q. Have you run extras around there?

A. Yes, sir.

5582 Q. And have you flagged them?

A. Yes I have.

5583 Q. Now why is it that you have to take such precaution in the yards Mr. Bell?

A. If you don't see the switch engine working around the yards you know they are out there somewhere.

651 5584 Q. And then it becomes your duty to look out for it?

A. Yes, sir.

Plaintiff objects as leading and suggestive.

By Mr. Berge: Mr. Witness when I am objecting, don't run a race with me to get the answer in before I can get my objection in.

By Mr. Holmes: Object to that.

By the Court: Be a little slower Mr. Witness; I don't think it is anything intentional.

Plaintiff moves to strike out that answer because I could not make any objection before he got it in and object as leading and suggestive.

Sustained. Exception.

5585 Q. In passing around and over that curve Mr. Bell what is the highest amount of speed that could be obtained and be under control?

Plaintiff objects as incompetent, irrelevant and immaterial, calling for a conclusion of the witness, the witness having already stated there is no rate to be applied which would be under control.

Overruled. Exception.

A. You ask me the question how fast we generally go around there?

5586 Q. No. (Question read.)

A. Not over five miles an hour.

5587 Q. Why is that so Mr. Bell?

Plaintiff objects as incompetent, irrelevant and immaterial calling for an opinion and conclusion of the witness and invading the province of the jury.

Sustained. Exception.

5588 Q. Is it the duty of the switch engine to flag around that curve?

Plaintiff objects as incompetent, irrelevant and immaterial calling for an opinion and conclusion of the witness and not any rule, not the best evidence, no foundation laid, the rules, the printed rules are the best evidence, calling for an opinion and conclusion of the witness.

Sustained. Exception.

5589 Q. I will ask you if it would be possible Mr. Bell for two engines coming around that curve in opposite directions and coming under full control to have an accident, a collision?

Plaintiff objects to that question as incompetent, irrelevant and immaterial requiring the witness to pass upon a question of fact which is for the jury as to what is control when coming towards each other, incompetent calling for an opinion and conclusion of the witness, no foundation laid.

Sustained. Exception.

By Mr. De Lacy: Defendant company offers to show by this witness as an expert that it would be impossible for two engines coming around that curve in opposite directions and each being under full control to have a collision.

Plaintiff objects as incompetent, irrelevant and immaterial requiring the witness to pass upon a question of fact which is for the jury as to what is control when coming towards each other, incompetent calling for an opinion and conclusion of the witness, no foundation laid.

Sustained. Exception.

Cross-examination.

By Mr. Berge:

5590 Q. Mr. Bell, did you say your name was?

A. Yes, sir.

5591 Q. I now hand you exhibit 9, that is the rules?

A. We are not working under this time table now.

5592 Q. Did you on December 8, 1909?

A. Yes, sir.

5593 Q. You find in that time table now the rule that requires any flagging of an extra around that curve?

653 A. I never said there was a rule in there in regard to an extra flagging around that curve?

5594 Q. And there is no such rule?

A. I never saw it in here.

5595 Q. There is no such rule?

A. I said no.

5596 Q. Running under control means to be able to stop your engine in the distance that you can see any obstruction on the track?

A. Yes sir.

5597 Q. That is a proper definition of it, ain't it?

A. Yes sir.

5598 Q. You say you are employed by the Rock Island road now as an engineer?

A. Yes sir.

5599 Q. And you have been continually for thirteen years?

A. No not as an engineer; I have been for seven years.

5600 Q. Seven years continuously?

A. Yes sir.

5601 Q. But you have been an engineer for thirteen years?

A. No, sir, I have not; I have been working for the Rock Island thirteen years. I was promoted in 1903.

5602 Q. You have been working for the Rock Island thirteen years?

A. Yes sir.

5603 Q. Your home is in Fairbury?

A. Yes sir.

Redirect examination.

By Mr. Holmes for the defendant:

5604 Q. Calling your attention Mr. Bell to rule 16 I will ask you what obstructions on the tracks in the yards named there are you expected to look out for?

Plaintiff objects to the question as the rule itself is the best  
654 evidence, incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness.

By the Court: Does the rule use the word obstruction?

By Mr. Holmes: Yes it says the word obstruction. I am asking what kind of obstruction.

By the Court: Objection overruled.

Exception.

A. In case you come down,—it is your duty to flag.

Plaintiff moves to strike that out, strike out the answer.

Sustained. Exception.

5605 Q. (First Question read again.)

A. Supposed to look out for the switch engine, or switches being against you.

5606 Q. The switch engine works within the yards?

Plaintiff objects as leading and suggestive.

Overruled. Exception.

A. Yes sir.

5607 Q. And if you don't see the switch engine when you come within the Lincoln yards, you say you are sure to find them somewhere else when you go out?

Plaintiff objects as leading and suggestive an opinion and conclusion of the witness, no proper re-direct.

Sustained. Exception.

## Recross-examination.

By Mr. Berge for the plaintiff:

5608 Q. "Under control," applies to a switch engine in the yards does it?

A. I don't understand your question there. A switch engine has the yard; a freight engine has got to look out for the switch engine.

5609 Q. A switch engine in the yards though under the 655 rules is required to run under control?

A. I don't know whether they got a rule about that or not. They got the yard.

5610 Q. Answer my question whether you know whether "under control" applies to switch engines in the yards?

A. No sir it does not.

5611 Q. Then there is no rule as to the speed a switch engine may run in the city, is that true?

A. No, sir only what the city ordinance has put on, I like down here in Lincoln, O street and across P street, six miles an hour. Other speed limits for the switch engine I never saw.

5612 Q. Then so far as railroad rules is concerned there is no limit to the speed of the switch engine in the Lincoln yards?

A. Only over O street and P and M, six miles an hour.

5613 Q. That is a city ordinance?

A. That is the city ordinance.

5614 Q. That is four miles an hour?

A. Six miles an hour.

5615 Q. How do you know?

A. I might be mistaken but the last I saw of it was six miles an hour.

5616 Q. Leaving out the ordinances and simply taking the rules of the railroad company are there any rules of the railroad company restricting the speed of switch engines in the yards?

A. No, sir there is not.

5617 Q. They can run as far as the rules, at 20 miles an hour?

A. Yes, sir.

5618 Q. That is you want it that way?

A. Yes sir.

5619 Q. That is your understanding?

A. Yes sir.

5620 Q. Is there anything in those rules applicable to 656 switch engines in yards?

A. No sir there is not.

5621 Q. When I say these rules I mean exhibit No. 9, you say there is not?

A. No, sir not that I know of.

5622 Q. Is there anything in any of the printed rules of the company?

A. No, sir there is not.

5623 Q. These are the rules of the company?

A. Yes, sir.

5624 Q. Anything about switch engines in yards in these rules?

A. No, sir there is not.

5625 Q. There are no rules as to switch engines are there?

A. No, sir, not that I know of, not in regard to speed limits.

5626 Q. Did you ever belong to a switching crew in a yard?

A. Yes sir.

5627 Q. Where?

A. South Belleville, Kansas and 30 months at Fairbury.

Redirect examination.

By Mr. Holmes for the defendant:

5628 Q. As I understand you then Mr. Bell the yards belong to the switch engine except as to first class trains?

Plaintiff objects as not proper re-direct.

Overruled. Exception.

A. Yes sir.

657 DELBERT F. GOIENS being produced and duly sworn on behalf of the defendant testified as follows:

By Mr. DeLacy for the defendant:

5629 Q. Your name is Delbert F. Goiens and you live at Fairbury?

A. Yes sir.

5630 Q. You are employed by the Chicago, Rock Island and Pacific Railway?

A. Yes sir.

5631 Q. In what capacity?

A. Fireman.

5632 Q. How long have you been fireman?

A. Two years.

5633 Q. During that time have you ever operated engines?

A. Yes sir.

5634 Q. What engines did you operate?

A. The wrecking train there at Fairbury.

5635 Q. And you was the wrecking engineer on the wrecking train?

A. Yes sir.

5636 Q. Previous to being a fireman were you in the employ of the Rock Island?

A. Yes sir.

5637 Q. In what capacity?

A. Wrecking.

5638 Q. Now in what capacity was you working for the company on December 8, 1909?

A. Fireman.

5639 Q. In the yards here in Lincoln?

A. Yes, sir.

5640 Q. On switch engine 1220?

A. Yes, sir.

5641 Q. Mr. Hall was your engineer?

A. Yes, sir.

5642 Q. And Reuben Carr was foreman of the crew?

658 A. Yes, sir.

5643 Q. Now we will skip until we get right down to the place of the accident. Do you remember at what rate of speed your engine was going when it went into the cut at Holdrege street?

Plaintiff objects as immaterial, incompetent, already gone into before in his deposition as read to the jury.

Overruled. Exception.

A. I should judge about eight or ten miles an hour.

5644 Q. Now immediately before the accident at what rate of speed was your engine running?

Plaintiff objects as immaterial, incompetent, already gone into before in his deposition as read to the jury.

Overruled. Exception.

A. Three to five miles an hour.

5645 Q. You were the fireman on that engine?

A. Yes, sir.

5646 Q. You may tell the jury whether or not your bell was ringing?

A. It was ringing; I was ringing it myself.

5647 Q. All the time during the progress through the cut?

A. Yes, sir.

5648 Q. Had it ever stopped?

A. No, sir.

5649 Q. It was continuously ringing?

A. Yes, sir.

5650 Q. Did you hear the bell ringing on the other engine?

A. No, sir.

5651 Q. Is it possible Mr. Goiens for a man working on an engine, in operation, with the bell ringing to hear the bell on the engine approaching from the opposite direction on the same track?

Plaintiff objects incompetent, irrelevant and immaterial calling for a conclusion and opinion of the witness, no proper foundation laid.

659

Overruled. Exception.

A. Pretty hard to hear it.

5652 Q. Why?

A. On account of the noise.

5653 Q. What noise?

A. Why from the engine and different noises about the engine.

5654 Q. The exhaust?

A. Well, yes.

5655 Q. The bell ringing?

A. Yes, sir.

5656 Q. Rattling of the wheels on the rails?

A. Yes and tanking bumping.

5657 Q. Shoveling coal that you have to shovel?

A. Sir?

5658 Q. The noise of coal shoveling?

A. Why yes if you are down shoveling it.

5659 Q. You jumped off did you not Mr. Goiens?

Plaintiff objects as leading.

(Question withdrawn.)

5660 Q. Before you jumped off of the engine Mr. Goiens did you hear the air go on in your engine 1220?

Plaintiff objects as leading, suggestive, incompetent, assuming.  
Overruled. Exception.

A. No sir but I felt it.

5661 Q. Oh you felt it go on?

A. Yes, sir.

5662 Q. Explain to the jury what you means by felt it.

A. You can feel a sudden stop when the air goes on the engine or reduces the speed.

5663 Q. That was put on immediately after?

A. Yes, sir.

5664 Q. Did you fire that engine any afterwards?

A. No, sir.

660 5665 Q. Did you notice your engine after the collision?

A. No, sir.

5666 Q. Do you know whether the brakes were set after the collision?

A. I would not swear to that. I was at the hospital with Mr. Wright.

5667 Q. Did you hear any whistle blown on engine 1486?

A. No, sir.

5668 Q. Did you hear 1486 coming towards 1220?

A. Yes, sir.

5669 Q. State to the jury as compared to the rate of speed how 1220 was going, whether or not engine 1486 was going faster or slower?

Plaintiff objects to the question as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness, no foundation laid.

A. Why I should judge they was going faster.

5670 Q. What makes you think so?

Plaintiff objects as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness.

Overruled. Exception.

A. Why I should judge if they was not going any faster than we are why they would not have got together.

5671 Q. What other reason have you for thinking so?

Plaintiff objects as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness.

Overruled. Exception.

A. Why that is about all.

5672 Q. Was 1486 working steam when you saw it? Tell the jury if you know?

Plaintiff objects as leading, suggestive, assuming, incompetent, irrelevant and immaterial.

Overruled. Exception.

A. Well now I could not answer that because I was pretty  
661 well excited, in getting out of there.

5673 Q. How did you go out?

A. Right out of the window.

5674 Q. You went on your head?

A. On my shoulders.

5675 Q. Did you go by where Mr. Wright was pinioned?

A. Yes, sir.

5676 Q. Did you assist in taking him out?

A. Yes, sir, assisted in taking him out and keeping him warm as  
I could while he was in there.

5677 Q. Assist in carrying him to the hospital?

A. Yes, sir.

5678 Q. How long have you been working on engines did you  
say all together?

A. Why four years here.

5679 Q. You have worked in and around this Holdrege street  
cut a good many times?

A. Yes, sir.

5680 Q. And you were familiar with the rules of the company?

A. Pretty familiar with them, yes, sir.

5681 Q. Now you may tell the jury what in your opinion would  
be the maximum rate of speed at which an engine going around  
this cut could go and be under full control?

Plaintiff objects as incompetent, irrelevant and immaterial, calling  
for an opinion and conclusion of the witness, invading the province  
of the jury.

A. For me I would want it to be about five miles an hour.

5682 Q. And that would be the maximum speed?

A. Yes, sir.

5683 Q. Why would you say that?

Plaintiff objects as incompetent, irrelevant and immaterial, calling  
for an opinion and conclusion of the witness and not a statement of  
any facts.

Sustained. Exception.

662 Cross-examination.

By Mr. Berge for the plaintiff:

5684 Q. You gave a deposition in this case at Fairbury?

A. Yes, sir.

5685 Q. In which I examined you?

A. Yes, sir.

5686 Q. And in which you were asked about the speed of Mr. Wright's train?

A. Yes, sir.

5687 Q. And were you asked this question: "And the very minute you saw the other engine you jumped" and you answered: "Yes, sir".

Defendant objects because the witness has already answered the same way.

Overruled.

Exception.

5688 Q. You answered that way?

A. I said "Yes, sir".

5689 Q. And were you asked this question: "You did not take time to make any calculation as to the speed they were going" and didn't you answer "No I did not"?

A. Yes, sir.

Defendant objects for the reason that the witness answered the same way now.

Overruled.

Exception.

5690 Q. And was this question asked you: "You don't know" and didn't you answer by asking the question: "Know the speed they were going?"—Q. "You don't know anything about their speed" and didn't you answer: "No, sir"?

A. Yes, sir.

5691 Q. That is the fact about it?

— Yes, but on further there—

5692 Q. Now a moment, you did jump the very minute you saw the other one coming?

A. Yes, sir.

5693 Q. You did not yell or say anything. You just jumped?

663 A. I yelled to the engineer there they was.

5694 Q. There they was?

A. Yes sir or something similar to that, to my engineer.

5695 Q. But you jumped at once?

A. I got out of there as quick as I could get out.

5696 Q. Frog fashion?

A. Yes anyway to get out.

5697 Q. And your engineer jumped at the same time?

A. No I would not swear to that.

5698 Q. You say you were considerably excited after that. You said on direct examination?

A. Yes I was excited; most anybody would be, wouldn't they?

5699 Q. You say you did not hear the air go on?

A. That is what I said.

5700 Q. But you felt it?

A. I could feel it.

5701 Q. But the engineer did not know it until you yelled to him; he jumped the minute you yelled?

A. I said I jumped, made preparations to get out of there the minute I could.

5702 Q. You did not waste any time on preparation?

A. No, sir.

5703 Q. You got right out?

A. Yes, sir.

5704 Q. And you yelled to the engineer?

A. Jump,—I did not say "Jump".

5705 Q. That is the first he knew about it?

A. That is the first he knew about it.

5706 Q. And you jumped while you yelled?

A. No I did not jump while I yelled.

5707 Q. Yelled first?

A. Yelled first.

5708 Q. But you jumped immediately?

664 A. Got out of there as quick as I could.

5709 Q. But still you will swear you felt the air go on before you got off that engine?

A. I think I will swear.

5710 Q. You will swear to that?

A. Yes, sir.

Redirect examination.

By Mr. De Lacy for the defendant:

5711 Q. How do you put on the air?

A. Caused by the engineer's valve, pulling it around.

5712 Q. Can be put on instantly?

A. Can be put on by what is called the emergency or service application.

5713 Q. But it can be done instantly?

A. Yes, sir.

5714 Q. And you felt the air that day?

A. Yes, sir.

5715 Q. Now how far did your engine go after you jumped?

Plaintiff objects as not proper re-direct and fully gone into in the examination in the deposition read to the jury.

Sustained.

Exception.

By Mr. De Lacy: We ask leave to recall the witness to re-examine him again.

5716 Q. Now Mr. Goiens I will ask you how far your engine went if you know after you felt the air go on and jumped?

A. Well I gave it there in the testimony before about fifteen feet.

5717 Q. Then stopped.

A. Stopped.

665 Recross-examination.

By Mr. Berge:

5718 Q. What do you mean by fifteen feet?

A. I gave it to you didn't I in the testimony about fifteen feet?

5719 Q. What did you give to him a while ago, what?

A. Fifteen feet that the engine ran after I jumped.

5720 Q. How far did the engine run after you saw it before you jumped?

A. Well I could not exactly answer that question.

5721 Q. Well I would like to have you?

A. I could not answer it right now.

5722 Q. Do you want to try it at all?

A. No, sir.

5723 Q. Could you locate the place where you were when you first saw the other engine?

A. Yes, looking out the cab window.

5724 Q. After you saw the other engine, did you see the engineer?

A. What engineer?

5725 Q. Your own?

A. No, sir because it is pretty hard to see them through that engine.

5726 Q. You did not look that way at all?

A. I just hollered.

5727 Q. Were you sitting down with your legs inside on the seat here or standing up?

A. Standing up with one knee on the seat.

5728 Q. The left knee on the seat and the very minute you saw it you leaped right out?

A. Got out as quick as I could get out.

666 5729 Q. Did you take a good long yell or holler first?

A. I yelled there she was.

5730 Q. And getting out at the same time?

A. Getting out as quick as I could.

Redirect examination.

By Mr. De Lacy:

5731 Q. Where was Mr. Wright's engine when you first saw it?

Plaintiff objects to that question as fully gone into in the deposition.

Sustained.

Exception.

Witness excused.

(Book of railroad rules identified as exhibit 22.)

G. W. HALL being recalled on behalf of the defendant testified as follows.

By Mr. De Lacy for the defendant:

5732 Q. You are the same Mr. Hall that was previously sworn and testified as an engineer?

A. Yes, sir.

5733 Q. Now I will ask you in your opinion Mr. Hall what is the maximum speed at which an engine could run around and through that cut at Holdrege street being under full control?

Plaintiff objects to that question as calling for an opinion and conclusion of the witness, incompetent, irrelevant and immaterial and the question itself calling for and passing upon the question of what or what is not under control under the circumstances there; it is a question for the jury.

Overruled.

Exception.

667 5734 Q. I mean coming from the east?

A. Well I would not want to be going over four; not over four or five miles an hour.

5735 Q. At any point in that curve?

Plaintiff objects to that question as calling for an opinion and conclusion of the witness, incompetent, irrelevant and immaterial and the question itself calling for and passing upon the question of what or what is not under control under the circumstances there; it is a question for the jury.

Overruled.

Exception.

A. Yes any point in it.

Witness excused.

By Mr. Holmes: The situation has changed somewhat out there and we have spent a whole week here, Mr. Berge has in showing conditions there and the jury has got that in their minds; now there is no purpose served in sending the jury out there unless they can see a test between two engines and we can not to-night have two engines there.

By Mr. Berge: What do you want to do with two engines and who is going to run them. Let him make his request in the record, and it is immaterial to me, I want the jury to see the place out there.

By Mr. Holmes: I could not say plainer than what I have already said, unless this test could be made to show the test of speed, the distance within which an engine could be stopped.

By Mr. Berge: I have no objection to an engineer going out there and testing it, none whatever.

By Mr. Holmes: Going to show when you put two engines there how far they can see.

668 By Mr. Berge: I have no objection to the two engines.

By the Court: You have to consent to this or I won't send

them out; there will be nothing done, in either line unless by agreement.

By Mr. Holmes: I made an objection to it, just simply because I can't see any purpose unless you have got two engines there so we can see how far we can see. Now we have not got two engines now. Now if your honor wants to send that jury out there——

By the Court: I have said already that I shall deny both requests except by agreement.

By Mr. Holmes: I did not understand it.

By Mr. Berge: I will agree to whatever Mr. Holmes lays down as a condition. If he wants two engines to perform there I will agree to it with respect to the view of the premises out there.

By Mr. Holmes: You want it done when we cannot do it.

By Mr. Berge: I am willing to do it at any time when we try this law suit,—Let the jury see two engines there and experiment with them and whatever suggestions you make there, I will agree to them.

By the Court: Both requests denied.

(At 4:30 P. M. Tuesday, March 21, 1911 adjournment taken until tomorrow morning.)

At 9:30 A. M. Wednesday, March 22, 1911. Trial proceeds.

By Mr. De Lacy: The defendant offers to use in evidence the answer and the questions on page 81 of the deposition of Mr. Hinitt, Question and Answer marked "C" which was sustained on cross examination for the reason that it was improper cross-examination and it now becomes proper to use it direct.

669 By Mr. Berge: Plaintiff objects first because it was read and second because it is incompetent, irrelevant and immaterial and calling for an opinion and conclusion of the witness, no proper or sufficient foundation laid and for the further reason that it is not shown that the witness is not within the jurisdiction of the Court.

Overruled.

Exception.

(Question and Answer page 81 read by Mr. De Lacy from the deposition of Hinitt. Copied as follows:

"Q. What was the rate of speed as near as you can estimate, in your judgment, up to the time the emergency brake was applied?

A. Ten miles an hour."

D. BURLEIGH being produced and duly sworn on behalf of the defendant testified as follows.

By Mr. Holmes for the defendant:

5736 Q. Where do you live Mr. Burleigh?

A. Fairbury, Nebraska.

5737 Q. How long have you lived there?

A. This is the nineteenth year.

5738 Q. What official position do you hold with the defendant company?

A. Train master of the Nebraska division.

5739 Q. Where is the Nebraska division Mr. Burleigh?

A. It runs from Philipsburg to Council Bluffs, and from Nelson to Horton. I have charge of that part from Fairbury to Omaha and Horton, Kansas.

5740 Q. How long have you occupied that position as train-master?

A. Twenty-two years.

5741 Q. You may briefly define what the duties of the train master are?

A. Well, have charge of all trains, all trains and engine men, station agents, brakemen etc.

5742 Q. Did they come under your employment?

670 A. Yes, sir.

5743 Q. And would that be so between Fairbury and Council Bluffs?

A. Yes, sir.

5744 Q. You think part of your duties have to do with the employment of employees?

A. That is the train men; all of the train men I employ myself.

5745 Q. All of the train men are those that are engaged in operating engines and trains?

A. No the engine men are hired by the mechanical department.

5746 Q. How?

A. The engine men are employed by the mechanical department.

5747 Q. And when those men in your department, engine men are employed, what is the course that is pursued so far as examination is concerned?

By Mr. Berge: Plaintiff objects to that question for the reason that the witness has answered that he does not employ, but that they are employed by the mechanical department, no proper or sufficient foundation laid, calling for an opinion and conclusion of the witness.

Overruled.

Exception.

A. The engine men are turned over to the transportation department for examination as to their fitness for the position, which they are going to take.

5748 Q. What if anything do you have to do with the examination?

A. I examine them on the rules, the book of rules.

5749 Q. Such as are published in exhibit No. 22?

A. Yes, sir.

5750 Q. And the time table offered in evidence here?

A. Yes, sir.

5751 Q. I will ask you Mr. Burleigh if exhibit No. 22 is the book of rules that was in force in December, 1909.

A. Yes it is.

671 By Mr. Holmes: The defendant company now offers in evidence exhibit No. 22, Railroad Book of Rules.

By Mr. Berge: Plaintiff objects to the whole book being offered

for the reason it unnecessarily encumbers the record. If there are any rules there that have any application to this case, bearing on any issue, I don't mean that the objection shall reach that.

By Mr. Holmes: I offer the book of rules in its form and in the manner in which it is issued and also include the rules to which attention has been called by the plaintiff.

By Mr. Berge: Add to my objection for the further reason that the book of rules contains over 125 pages and counsel does not challenge attention either to the witness or counsel for plaintiff what rules he refers to or relies upon and it would be impossible for me to go through those rules and be prepared for them in rebuttal, not having my attention called to any particular rule that he relies on.

Sustained.

Exception.

By Mr. Holmes: I now offer in evidence of the book of rules exhibit 22, rule 97a.

Defendant now offers in evidence rule 99.

Defendant now offers in evidence the five paragraphs of rule 99 found upon page 35.

(The above rules read to the jury by Mr. Holmes.)

Defendant offers in evidence the second and third paragraphs found upon page 14 of exhibit 22 giving the definition of yard.

(Read to the jury by Mr. Holmes.)

Defendant now offers in evidence page 11 of general rules and marked paragraphs *a, b, c, d, e, f, g, h, j, and k.*

(Read to the jury by Mr. Holmes.)

672 Defendant now offers in evidence that part of page 12 commencing at the word: "definition" down to and including paragraph 7 of page 13.

Plaintiff objects as incompetent, irrelevant and immaterial, bearing no issue in the case, unnecessarily encumbering the records.

Overruled.

Exception.

(Read to the jury by Mr. Holmes.)

Defendant now offers in evidence rule 102 found upon page 36.

(Read to the jury by Mr. Holmes.)

Defendant offers in evidence rule 106 found upon page 37 (Read to the jury by Mr. Holmes).

Defendant offers in evidence rule 86 found upon page 31 (Read to the jury by Mr. Holmes).

(All of the above rules in exhibit 22 received in evidence.) Said exhibit is attached hereto at the end of bill of exceptions and made a part hereof.

5752 Q. Mr. Burleigh were you acquainted with Otto Wright in his life time?

A. I have met him.

5753 Q. Where did you first meet him?

A. Fairbury?

5754 Q. How did you happen to meet him there?

A. He was sent to me for examination on the rules for an engineer.

5755 Q. Did you make an examination of Mr. Wright's understanding and ability as to the rules in controversy now in this case?

Plaintiff objects to the question, first, because it is incompetent, irrelevant and immaterial, and further because the witness on the stand now is, as he has testified, a representative of the defendant railroad and that the defendant railroad company has a direct legal interest in the result of this action and in this action the  
673 adverse parties are the representatives of a deceased person, no foundation laid.

Overruled.

Exception.

A. Yes, sir.

5756 Q. You may state the result of that examination?

A. He had a clear understanding of all the rules.

5757 Q. By rules what rules do you mean?

A. All of them.

5758 Q. Contained in this book No. 22?

A. Yes, sir.

5759 Q. And in time table 11b?

A. Yes, sir.

5760 Q. At that time of that examination, Mr. Burleigh, what was said to him in reference to conduct of trains in certain yards if anything?

A. Plaintiff objects as incompetent, irrelevant and immaterial, not proving any issues in this case and for the further reason that the witness and the defendant both have a direct legal interest in the result of this suit and that the adverse parties are the legal representatives of a deceased person. Overruled. Exception.

A. His attention was called especially to the yards and yard limit and the speed of trains through the limits of different yards.

5761 Q. Of all the yards?

A. All the yards.

5762 Q. Was anything said about the Lincoln yards particularly?

Plaintiff objects as incompetent, irrelevant and immaterial, and proving no issue in the case seeking thereby to change and modify the rules of the defendant and this witness has a direct legal interest in the result of this suit and the plaintiffs are the  
674 representative of a deceased person and incompetent. Overruled. Exception.

A. I could not say as to that especially.

5763 Q. You don't recall now any conversation had particularly as to the Lincoln yards?

A. No, I do not; his attention was called to all of the yards and yard limits all included.

5764 Q. What was said if anything in reference to the presence of switch engines?

Plaintiff objects as leading, suggestive, incompetent, irrelevant and immaterial calling for a conversation with a dead man and

the defendant railroad company has a direct legal interest in the result of this suit and the plaintiffs are the representative of a deceased person, and seeking to change and to modify the written rules, not binding upon the plaintiff in this case. Overruled. Exception.

A. Switch engines had the right over all except first class trains in the yards and other trains would have to look out for them.

5765 Q. I understand that you said that to him?

Plaintiff objects as leading, suggestive, incompetent, irrelevant and immaterial calling for a conversation with a dead man and the defendant railroad company has a direct legal interest in the result of this suit and the plaintiffs are the representative of a deceased person, and seeking to change and to modify the written rules, not binding upon the plaintiff in this case. Overruled. Exception.

5766 Q. You said that to Mr. Wright?

675 Plaintiff objects as leading, suggestive, incompetent, irrelevant, and immaterial calling for a conversation with a dead man and the defendant railroad company has a direct legal interest in the result of this suit and the plaintiffs are the representative of a deceased person, and seeking to change and to modify the written rules, not binding upon the plaintiff in this case. Overruled. Exception.

A. That was in the examination.

5767 Q. And Mr. Wright in his examination made that response?

Plaintiff objects as leading, suggestive, incompetent, irrelevant, and immaterial calling for a conversation with a dead man and the defendant railroad company has a direct legal interest in the result of this suit and the plaintiffs are the representative of a deceased person, and seeking to change and to modify the written rules, not binding upon the plaintiff in this case. Overruled. Exception.

A. He gave his understanding as to the rules as they were read to him.

5768 Q. Mr. Burleigh, considerable has been said here about running under control, and full control. You may tell the jury what is meant by that term?

A. Under control means to run at a speed which it would be impossible for two trains coming in opposite direction to collide with one another.

5769 Q. At that examination was this question of full control involved in the examination had by you of Mr. Wright?

A. Yes, sir.

5770 Q. And was Mr. Wright's response in that examination as given now by you?

Plaintiff objects as incompetent, irrelevant and immaterial and proving no issue in the case, seeking by oral testimony to change and abrogate the printed rules, and for the further reason the witness has a direct legal interest in the result of this suit the plaintiffs are the representative of a deceased person. Overruled. Exception.

A. Yes, sir.

Cross-examination.

By Mr. Berge for the plaintiff:

5771 Q. You say you have been examining men for employment as engineers for how long?

A. Twenty-two years.

5772 Q. Examined a great many men?

A. I think the majority of all of them that we have.

5773 Q. Would you undertake to say, Mr. Burleigh, that you can remember all these individual conversations you had with each one of those men?

A. I can not.

5774 Q. Would you swear to this jury that you could relate the questions that you asked Mr. Otto O. Wright, the deceased, and the answers he made individually, and the questions that you asked?

A. No.

5775 Q. Your testimony here is based upon your general practice of examining employees?

A. The same examination is used with all conductors and engineers.

5776 Q. That is what I mean, the examination that you base your testimony here to-day?

A. Yes, sir.

5777 Q. You could not say now that you recall specifically the instance or circumstance of the examination of Mr. Wright?

A. Well I can call it well to mind.

677 5778 Q. There were others examined at the same time?

A. Yes, sir.

5779 Q. How many more?

A. One.

5780 Q. Who was the other man?

A. A man by the name of Shannon.

5781 Q. Where was the examination had?

A. In my office at Fairbury.

5782 Q. When was this?

A. It was along I think in September.

5783 Q. And what time of the day was it?

A. In the afternoon.

5784 Q. And how long did it take you to conduct the examination?

A. About three hours.

5785 Q. And only you three men present?

A. That is all.

5786 Q. And was that after his student trip or before?

A. It was after.

5787 Q. How do you know?

A. Because I would not examine him until he had learned the road.

5788 Q. How do you know?

A. Because I asked him.

5789 Q. And you say the Lincoln yards were not talked about?

A. Not especially, any more than all of the yards, and yard limits.

5790 Q. Well you have been instructing these men that have testified in this case, practically all of them, haven't you?

A. Which, in their examinations?

5791 Q. Yes?

A. Yes sir.

5792 Q. Do you examine only engineers or firemen too?

A. All of them.

5793 Q. Brakemen and switchmen?

A. Everybody that operates trains.

678 5794 Q. Well now did you examine this man Mr. Palmer who was on the witness stand here yesterday?

A. I did not.

5795 Q. Did you examine these other witnesses, any of them that were on the witness stand in this trial?

A. I could not call to mind just now. I don't examine on the new book.

5796 Q. Well you heard the testimony of all of the other railroad men here respecting the definition of the term or phrase: "running under control", answer yes or no whether you have heard it?

A. Yes I have heard it.

5797 Q. Some of those men are men who came out of Fairbury under your examination?

A. Yes, sir.

5798 Q. Do you have a switch engine in Fairbury?

A. Yes, sir.

5799 Q. Do you examine the men on there?

A. Yes, sir.

5800 Q. The same examination?

A. Yes, sir.

5801 Q. You read the whole book through do you, on examination?

A. All pertaining to the train rules and orders.

5802 Q. Answer my question whether you read the whole book through or not?

A. No, sir.

5803 Q. You simply examine them on questions you think are material?

A. On the train rules.

5804 Q. On the train rules,—well all of those are train rules?

A. No, sir.

5805 Q. What are they?

A. Some are instructions to other officials and employees.

679 5806 Q. Well you mean you read them through to them?

A. Yes, sir.

5807 Q. Just sit down and read them through?

A. Yes and then ask them their understanding.

5808 Q. And are your rules the same as other rules?

A. I could not say as to that.

5809 Q. And ask as to their understanding. When you have three or four, how do you manage it?

A. How is that?

5810 Q. When you have three or four under examination?

A. It is very easy to do that.

5811 Q. How do you do that?

A. Ask him for his understanding, let him repeat the rule if I think it is necessary.

5812 Q. If you think it is necessary?

A. Yes, sir.

5813 Q. You say your business is trainmaster?

A. Yes, sir.

5814 Q. Also claim agent in connection with it?

A. No, sir.

5815 Q. Has been before?

A. No, sir.

5816 Q. Have you settled claims heretofore?

A. No, sir.

5817 Q. Take it in the last ten or fifteen years?

A. No, sir.

5818 Q. When you say you examine men for switch engines do you use these rules?

A. Yes and the time tables.

5819 Q. You tell switch engine men that they have a right to run twenty-five miles an hour in the yards?

A. Yes, sir.

680 5820 Q. You tell them that?

A. If they want to. I don't tell them anything about running.

5821 Q. How is that?

A. I don't tell them anything about how fast they shall run or how slow.

5822 Q. You understand of course that they can at any time run their engine negligently?

A. I understand that, yes.

5823 Q. You don't tell them to be careful at all when you instruct your switch engine men?

A. I tell them to run their engine according to the rules.

5824 Q. But you have no rules respecting switch engines?

A. No, we have instructions sometimes.

5825 Q. Have you any rules respecting switch engines?

A. No, sir.

5826 Q. There is nothing in any of those rules respecting switch engines?

A. Nothing at all, any more than what you have here read there.

5827 Q. Don't the switch engines make up trains in the yards?

A. Yes, sir.

5828 Q. All trains are made up by switch engines aren't they?

A. Yes, sir.

5829 Q. And if there are any trains made up in the yards, it is done by switch engines?

A. By switch engines.

5830 Q. It is done by switch engines?

A. Oh, sometimes we can use—

5831 Q. Rule 102 says: "When cars are pushed by an engine except when shifting and making up trains in yards", that refers to switch engines, don't it?

A. Yes, sir.

5832 Q. Then 102 refers to switch engines?

A. It would refer to it yes, or any other train.

681 5833 Q. But it includes a switch engine?

A. It includes all.

5834 Q. Will you say that your rules in here,—what do you tell your switch engine men about your rules, about running under control in yard limits?

A. Don't tell them anything, not in regard to running under control in the yards.

5835 Q. They understand that?

A. They understand it.

5836 Q. How many times in his life time did you see Mr Wright?

A. Oh, probably three or four times, possibly more. I could not say as to that.

5837 Q. You will swear that you have a distinct recollection of him?

A. Yes I remember the man very distinctly.

Redirect examination.

By Mr. Holmes for the Defendant:

5838 Q. I understand it Mr. Burleigh when you examine an engineer you examine as to his ability for any service in the conduct of an engine?

Plaintiff objects as not proper redirect. Overruled. Exception.

A. Yes that is handling of trains or engines.

5839 Q. Then you assign him for duty any place in the yards, or any place?

A. I give him an order to the mechanical department to use him.

## 682 Recross-examination.

By Mr. Berge for the plaintiff:

5840 Q. If that is so why did you say you would not examine Mr. Wright unless he had made his student trip, if you say now that you will examine them simply generally when they make application for employment and then examine them afterwards?

A. I ask them if they have made the student trip first.

5841 Q. Where over the whole road?

A. Whether they have learned the division.

5842 Q. Suppose he has not been assigned to a division?

A. He has not been assigned but he is going to run on the Nebraska division.

5843 Q. At Fairbury you run east and west?

A. That is all Nebraska division.

5844 Q. Suppose he don't run either way and suppose you are going to use him in the yards?

A. That don't make any difference.

5845 Q. If you examine a man for a switch engine, you ask him if he has been over the division east and west?

A. No sir, not for a switch engineer.

5846 Q. How do you know whether to assign him?

A. The switch engineer is usually taken from the fireman.

5847 Q. Suppose a man is not assigned any place and you don't know what you are going to do with him?

A. I was going to use him.

5848 Q. Use him as an engineer. You don't know whether he is going to be a switch engineer, or going east or going west?

A. His examination would cover it just the same.

5849 Q. You still say you would not make the examination until he had been over the division?

A. That is for a new man.

5850 Q. Would you say that?

683 A. For a new man.

5851 Q. Would you say that?

A. You have got my answer.

5852 Q. Well they are all new men when you examine them?

A. Not all of them.

5853 Q. What kind of fellows are new?

A. Firemen that fire there five or six years, we don't consider him a new man, we know he has been over the division.

5854 Q. You give him another examination?

A. We give him the rule examination.

5855 Q. The rule examination simply covers general qualifications about working for you and knowing about the movement of trains?

A. A switch engine man is usually taken from the fireman's list.

5856 Q. Usually but not always sir?

A. Well as a general rule.

5857 Q. Not always, is he?

A. Well as a general rule.

Witness excused.

W. P. OAKFORD being produced and duly sworn on behalf of the defendant testified as follows:

By Mr. Holmes for the defendant:

5858 Q. Where do you live?

A. Fairbury.

5859 Q. What is your business?

A. Road foreman of equipment.

5860 Q. What does that mean?

— That means that I have charge of all the equipment on the Nebraska division, and men, that operate it.

5861 Q. What do you mean by equipment?

A. Engines and cars.

684 5862 Q. Then as I understand it, you have charge of all engines and cars of all kinds over the Nebraska division of the Rock Island?

A. I have except hand cars.

5863 Q. Except hand cars. How long have you occupied that position?

A. Three years, nearly three years.

5864 Q. Where did you come from to Nebraska?

A. Colorado division, Goodland, Kansas.

5865 Q. And you had been on the Rock Island there?

A. Yes, for eighteen years.

5866 Q. Are you an experienced locomotive engineer?

A. Yes, sir.

5867 Q. Have you graduated Mr. Oakford from any school of technology?

A. I have not.

5868 Q. How have you gained your experience and knowledge of locomotives?

A. By experience and books.

5869 Q. How long an experience have you had in that direction?

A. In the motive power department?

5870 Q. Yes?

A. About eighteen years, nineteen years.

5871 Q. Were you acquainted with engine 1486 on the Nebraska division here in December, 1909?

A. I seen the engine on the Nebraska division when it was en route from the Colorado division there to the shop; it was not assigned to this division.

5872 Q. It was not assigned to this division?

A. No, sir. However I have run the engine on the Colorado division a good many times.

5873 Q. Have you any chart showing the construction of that engine?

A. Yes, sir.

5874 Q. Will you produce it?

685 A. (Witness produces chart.)

5875 Q. Do you now hold in your hand a blue print of engine 1486?

A. Page 34.

5876 Q. Can that leaf be removed from that file?

A. It can if they will return it to the file again.

5877 Q. Well I think you may remove it?

A. I guess I can paste it back in there again.

5878 Q. Taking exhibit 22 Mr. Oakford can you tell the jury the weight of 1486—

By Mr. Holmes: Defendant offers it in evidence.

(Examined by Mr. Berge as to competency.)

5879 Q. Is this a cut of that particular engine or that class of engines?

A. Of that particular engine and the class also 1486 is on there,—the number given. Engine- 1472-5-7, 1481-4 to 1486, and 1488 etc., there is a lot of them on there;—all those engines are of that same class.

5880 Q. This cut was not made of this particular engine, but to represent that class of engines?

A. Yes, sir.

5881 Q. This has got a cow catcher on, has not got any foot board on?

A. 1486 was equipped exactly like that when she had that collision.

5882 Q. It was not changed?

A. It was not changed; they mashed the cow catcher off in the collision.

5883 Q. Wasn't there a foot board?

A. No, sir. You have her confused with 1220. I believe 1220 had a footboard but 1486 was equipped as it shows here.

686 Exhibit 23 blue print of engine received in evidence without objection attached hereto at end of bill of exceptions and made a part hereof.

5884 Q. What was the weight now Mr. Oakford of engine 1486?

A. Do you want the total weight of the engine, tender and all?

5885 Q. Yes tank and all?

A. 289,000 pounds.

5886 Q. The tank is as much a part of the engine as the engine itself?

A. It is generally speaking.

5887 Q. But they are detachable?

A. Yes, sir.

5888 Q. What was the length of engine 1486?

A. The length over all was sixty-four feet, from the point of the pilot to the rear of the draw bar.

5889 Q. Sixty-four feet?

A. Yes, sir.

5890 Q. How many drive wheels did that engine have?

A. Six.

5891 Q. Can you tell the jury what its steam capacity was?

A. 190 pounds.

5892 Q. What is meant by that?

A. 190 pounds per square inch.

5893 Q. 190 pounds steam pressure per square inch?

A. Square inch, the interior of the boiler.

5894 Q. On December 8, were you familiar with this engine 1486 on that day?

A. I seen the engine before she left Fairbury on that day.

5895 Q. You saw it?

A. Yes, sir.

5896 Q. How was the tank fastened on to the base on that engine 1486?

687 A. By four lugs as we call them.

5897 Q. Describe the lugs, or does that blue print show the lugs?

A. No it does not.

5898 Q. Describe the lugs?

A. It was an iron band at a right angle which was riveted on the tank, and the other has bolts, bolting it down, on either corner.

5899 Q. Were there any other bolts or fastenings?

A. Nothing you would call fastenings only the pipe that goes through the front of the tank down through the bed that the water is conveyed through, two 3-inch pipes.

5900 Q. How many, two?

A. Two, one on either side.

5901 Q. Their effect would be to help hold the tank?

A. Yes, sir.

5902 Q. What is the thickness of those pipes?

A. The iron is an eighth of an inch.

5903 Q. Where are those pipes located?

A. In the front corners of the tank in the bottom.

5904 Q. One on each corner?

A. Yes, just inside of the tank.

5905 Q. And the lugs are on each corner?

A. On the outside.

5906 Q. And the one lug fastens on the tank and the other lug fastens on the base?

A. Well each lug fastens on to bolts.

5907 Q. One end of the lug?

A. Yes one end here and the other end up at the tank. (Indicating.)

5908 Q. Was the tanks of all engines of that class so fastened?

A. Yes, sir.

5909 Q. Did you see the engine 1486 after the accident?

A. Yes, sir.

5910 Q. Where did you see it?

688 A. In the Lincoln yards.

5911 Q. What was the condition of that tank at that time?

A. The lugs were torn off of the tank and both water pipes broken.

5912 Q. How do you mean the lugs were torn off, were they broken?

A. Just the rivets pulled out.

5913 Q. What are the size of those rivets?

A. Three-eighths.

5914 Q. Three-eighths of an inch?

A. Yes, sir.

5915 Q. How many rivets in each end of the lugs?

A. I could not tell you exactly, six to nine in the back ones and I think five in the front ones; I don't remember just exactly how many rivets there is in it.

5916 Q. Were you acquainted with the engine 1220?

A. Yes, sir.

5917 Q. Have you got a blue print of that engine?

A. I have.

5918 Q. Will you produce that?

A. (Blue print produced and identified as exhibit 24.)

By Mr. Holmes:

5919 Q. With the Court's permission can you substitute a blue print so that we could retain these?

A. Can I get some more?

5920 Q. Yes?

A. Yes I get a new one every year.

5921 Q. You tell the jury what the 1220 was?

A. The total weight of engine and tender?

5922 Q. Yes?

A. I will have to figure that one out; they don't put it down here. I can do it in a minute. Yes I have got it here 132,000 pounds.

5923 Q. In order to save time, Mr. Oakford, I have got a memorandum here I think you prepared?

A. That is correct.

5924 Q. You prepared that?

A. Weight of engine, total weight tender and all is 242,000 pounds.

5925 Q. 242,000,—and 1486 was what?

A. 289,000.

5926 Q. Then in round numbers 1220 was 42,000 pounds lighter than 1486?

A. 47,000.

5927 Q. 47,000. What was the length of 1220?

A. Fifty-eight feet eleven and seven-eighths inches.

5928 Q. Fifty eight feet and what was the length of 1486?

A. Sixty-four feet.

5929 Q. What was the steam capacity of 1220?

A. 160 pounds.

5930 Q. The 1486, what do you say?

A. 190.

5931 Q. You may tell the jury what the real difference in the

steam capacity of those two engines was as to its effect in the operation of the engine?

A. Well that would take quite a lot of mathematical performance here.

5932 Q. What I mean as to their movement, as to their pulling power?

A. Oh, their pulling capacity, 1220 had 19,000 pounds draw bar pull and the 1486 had *the* 30,000.

5933 Q. 30,000 pounds draw bar pull, explain what you mean?

A. Exerting that much power at the draw bar.

5934 Q. Draw bar is what you hitch on to pull the train?

A. To pull the train. We figure that the traction power gives you the tonnage of the train.

5935 Q. Did you make a personal examination of 1486 and 1220 upon the day after the accident?

690 A. I did on the day of the accident.

5936 Q. You may describe to the jury now, Mr. Oakford the condition that you found these two engines in?

Plaintiff objects as no proper foundation laid.

5937 Q. I will ask you had they been changed and repaired?

A. No sir. They—

5938 Q. They were just as they came out of the accident?

A. Just as they came out of the accident.

5939 Q. Now you may describe what happened to these engines in that collision?

A. Well the pilot beam, and the front section of the frame of the 1486 was broken, mashed off, the front end casting of the smoke arch was broken and caved in and slightly damaged. The tank, the cistern on 1486 was torn loose from its fastenings and shifted ahead from seven to ten inches on the tank body, that is the tank frame, what we call the body.

5940 Q. Let me ask you, did you see whether that tank had previously been moved farther up and then had been moved back?

A. I could not tell.

5941 Q. You could not tell that?

A. No sir.

5942 Q. You found it seven or eight inches off the base?

A. Yes seven to ten inches, I could not tell exactly; it was too far ahead to be in right position.

5943 Q. Go on with your description?

A. And that is all the damage there was to the 1486.

5944 Q. Well the pipes you say were broken?

A. The water pipes were broken off.

5945 Q. And where were they broken?

A. They were broken off just flush with the bottom of the tank.

5946 Q. And that would let the water run out of the cistern, let the water run out on the ground, let the water run out?

691 A. On the frame, the frame had slipped ahead so it was over the body of the tank, and not over the holes where the water would go through.

5947 Q. So it would ooze out?

A. Yes, around on the bottom of the frame.

5948 Q. Each of those engines had what you called a pilot beam?

A. Yes sir.

5949 Q. What is that?

A. A wooden beam of about 12 inch dimension stuff, heavy oak that goes across the engine from one end to the other and bolted to —.

A. An iron plate in behind it.

5951 Q. What was the condition of the pilot beam of 1486?

A. Entirely broken away and gone, entirely off, one of the frames was gone.

5952 Q. Was such a beam on 1220?

A. Yes sir.

5953 Q. What was its condition?

A. Broken?

5954 Q. Broken?

A. Broken, splintered up and gone.

5955 Q. This pilot beam extended right across the end of the engine?

A. Clear across.

5956 Q. The iron plates back of that, what was their condition?

A. They were bent up and broken, broken in two I think, three pieces there were.

5957 Q. Any other damage done to 1220?

A. 1220 had the front end broken in the same as the 86 had, the 1486 that is, and the pilot beam, and the front frame was broken and her headlight was entirely demolished. The engine trucks had been torn all to pieces in the accident, broke the jaws of the trucks.

692 5958 Q. What trucks, on 1220?

A. Yes, it was all to pieces, one end, found it in several different parts.

5959 Q. Now as an expert engineer, Mr. Oakford, and from your observation and investigation there, could you tell which engine had been struck there the hardest?

Plaintiff objects as not a subject of expert testimony incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness.

Sustained exception.

5960 Q. Would your observation of the two engines there show as to which engine had struck the hardest?

Plaintiff objects as not a subject of expert testimony, incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness.

Sustained.

Exception.

5961 Q. Could you tell from your observation there and from the injury done to each engine which engine struck the hardest?

Plaintiff objects as not a subject of expert testimony, incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness.

Sustained.

Exception.

By Mr. Holmes: The defendant offers to show by this witness that from the condition of the two engines after the accident he is able to state positively which engine had struck the hardest and was moving the fastest at the time of the collision.

Plaintiff objects as not a subject of expert testimony incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness.

Sustained.

Exception.

5962 Q. Mr. Oakford the evidence in this case shows that after 1486 had struck 1220, had collided with 1220, that it started  
693 southward toward the city of Lincoln and moved some distance south and then returned on its way to the point of collision again. Now I will ask you, had 1486 been reversed, the back motion had been on and the steam cut off and the air brakes applied whether it might not have been possible for 1486 to have again moved east after going south?

By Mr. Berge: Plaintiff objects to that question as incompetent, irrelevant and immaterial and because it does not properly reflect the evidence in this case and third because it is not the subject of expert testimony and calling for an opinion and conclusion of the witness, not based upon the facts in the case.

Overruled.

Exception.

A. It would be an impossibility for an engine reversed to back motion, and then again go ahead without the lever is changed.

5963 Q. You are familiar Mr. Oakford with the term "running under control."

A. Yes sir.

5964 Q. You may tell the jury what that means?

A. Being able to stop in the distance you can see and avoid damage to anything,—see the track clear.

5965 Q. You are familiar with the curve out here at the Holdrege street viaduct?

A. Yes, sir.

5966 Q. Now when an engine is going through there, tell the jury what "under control" means.

Plaintiff objects to that question as seeking to change and modify the definition he has given himself, incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness and asking the opinion of the witness, asked on the question of  
694 the negligence of the defendant company.

Overruled.

Exception.

A. If you want me to fully explain what "under Control" means I can do it.

5967 Q. That is what I asked you?

A. In the first place it depends altogether on which train is supposed to run "under full control"; they don't all have to run "under full control." The man that is supposed to run "under full control" would have to go in that cut and around that curve from three to five miles an hour.

Plaintiff moves to strike out the answer as not responsive to the question.

Sustained.

Exception.

5968 Q. The court says you can answer that question. Now proceed.

Plaintiff objects to that question as seeking to change and modify the *definite* he has given himself, incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness and asking the opinion of the witness asked on the question of the negligence of the defendant company.

Overruled.

Exception.

5969 Q. Now you may answer?

A. You take the case where you would find a stationery object on the track, if you can stop before you can get to that stationery object, you are under control. The man that is supposed to run "under control" has got to go around through those places.

By Mr. Berge: Plaintiff moves to strike out from there on "The man has got to go around through those places," as not responsive to the question.

Overruled.

Exception.

will have to come down to three to five miles an hour, be able to stop the engine within half the length of herself anyway.

695 5970 Q. And to be able to stop within one half the length of itself upon this curve in controversy, what is the maximum rate of speed that could be obtained?

Plaintiff objects as incompetent, irrelevant and immaterial, and not calling for the definition of the term "under control," but calling for an opinion and conclusion of the witness as to this particular cut how far an engine should run, in order to be under control, not a subject of expert testimony.

Overruled.

Exception.

A. As I said before not to exceed five miles an hour in there, but for anything like that he would have to flag around the curve, if he had no right, an inferior train.

Plaintiff moves to strike that out as not responsive to the question, and made without any question at all and voluntary.

Sustained.

Exception.

5971 Q. Now Mr. Oakford what duty did you have to perform in the equipment of engines?

Plaintiff objects as wholly immaterial, bearing on no issue in this case.

Overruled.

Exception.

A. To see that the engines were fully equipped with all of the required tools.

5972 Q. Now what consists of being fully equipped?

Plaintiff objects as calling for an opinion and conclusion of the witness, incompetent.

Overruled.

Exception.

A. They are supposed to be equipped with blocks, guide and pin block, pinch bar, brasses for truck journals, and small tools used by the engineer, such as hammers, monkey wrenches and chisels.

5973 Q. Now when 1486 left Fairbury on December 8, you say you saw that engine?

A. Yes, sir.

5974 Q. You now swear that it was equipped with those things that you have just mentioned?

A. It was.

5975 Q. I will ask you if any engines are ever equipped with track jacks?

Plaintiff objects to that question as incompetent, irrelevant and immaterial and the rule of negligence would not exonerate the railroad in this particular instance of an injury caused by its negligence.

Overruled.

Exception.

A. No, sir.

5976 Q. Or any kind of jacks?

Plaintiff objects to that question as incompetent, irrelevant and immaterial and the rule of negligence would not exonerate the railroad in this particular instance of an injury caused by its negligence.

Overruled.

Exception.

A. They are not equipped with jacks.

5977 Q. No none of the engines on the road?

A. None of them.

Plaintiff objects as already answered.

Overruled.

Exception.

## Cross-examination.

By Mr. Berge for the plaintiff:

5978 Q. Now will you tell the jury whether you examined this particular engine at Fairbury when it started?

A. I did not make an thorough examination of the engine.

5979 Q. How close were you to the engine?

A. I was standing within two feet of her.

5980 Q. You made no examination with respect to ascertain whether any of those tools were on the engine?

A. I did not.

5981 Q. Never thought about it at the time?

A. I did think of it, I had a man to do it.

5982 Q. What about?

A. About the tools, the examination of the tools.

5983 Q. You had a man do it?

A. Certainly I did.

5984 Q. How.

A. Check them over?

5985 Q. Check them over, how?

A. To see that they were all there.

5986 Q. What tools?

A. The equipment of the engine.

5987 Q. What is that equipment for?

A. For engineers to use.

5988 Q. In case of injury?

A. No to use in handling the engine in case of breakage of the engine, blocks to block the pins and guide pins.

5989 Q. Are jacks carried on the trains ever in case of accident or collision?

A. They are carried on the cars and caboose.

5990 Q. Jacks you say?

A. Yes sir.

5991 Q. What about freight trains?

A. They are carried in the cab.

5992 Q. Then it is a rule that on all trains such as that you carry jacks?

A. Where they have cabooses, yes, sir.

5993 Q. And on passenger trains, you carry them there?

A. In the baggage car, but that is not the equipment of the engine.

5994 Q. It is the equipment of the train?

698 A. The equipment of the car.

5995 Q. The equipment of the train?

A. Of the train, when you have a train it certainly is.

5996 Q. And you have heard the testimony that where there are no cars, the engineer is the conductor. You have heard that haven't you?

A. No sir.

5997 Q. Is that a fact?

A. That is a fact, absolute fact.

5998 Q. You say it is a fact?

A. He is not a conductor.

5999 Q. He is not a conductor?

A. No, sir.

6000 Q. If any of the witnesses have testified that way, it is a mistake?

A. He is performing the duties of a conductor, but not a conductor.

6001 Q. The duties of a conductor?

A. Yes sir.

6002 Q. It is regarded that way although there is only the engineer, fireman and switchman, or some of the train apparatus,—the duty of the conductor?

A. Yes, sir exactly so.

6003 Q. Usually in trains there is an equipment including jacks?

A. In cars there is.

6004 Q. The definition of "under control" does mean to be able to stop your engine as far as you can see?

A. It does.

6005 Q. That is the question that is put to people so far as you know when they are examined for the purpose of entering the service, and what they are told?

A. Yes that is what they are told.

6006 Q. You say you examined engine 1220?

A. I stood there while another man examined her for the equipment.

6007 Q. Along in the yards here?

A. Yes, sir.

6008 Q. Where was you?

A. Standing on the passing track by the local chute, Lincoln, Nebraska.

6009 Q. You said the trucks were all to pieces?

A. The engine truck was all to pieces exactly so.

6010 Q. They were on the track?

A. No sir they were out in the cut.

6011 Q. Well then the engine ran in without the pony trucks?

A. She did exactly on the driving wheels only.

6012 Q. Then you did not see the pony trucks there?

A. I did, went out and looked at them.

6013 Q. Out in the cut?

A. Yes, and picked them up, and brought them in, remodeled the trucks myself and put them under the engine.

6014 Q. The same engine?

A. Yes, sir, the same engine.

6015 Q. The engines was damaged about the same?

A. Yes, sir 1220 had the truck broke more than the other engine.

6016 Q. Did you observe how much coal there was in 1220, the coal car?

A. No, not exactly, it was nearly full though.

6017 Q. Or water?

A. No, sir, I did not look at the water at all.

6018 Q. Did you observe the coal on 1486?

A. About the same capacity of coal, it was up on the coal gates pretty well.

6019 Q. Of course the capacity was more in 1486?

700 A. Exactly the same.

6020 Q. Exactly the same on the two engines. Would you swear, you made the examination as to the exact amount of coal in each car?

A. No sir.

6021 Q. How much coal will each car hold?

A. Ten tons of coal.

6022 Q. That is added to the weight of the engine according to the amount of coal in there?

A. Yes, it makes her weigh ten tons or more when she is full of coal.

6023 Q. If the reverse lever is applied, that means the steam is put on backwards if she had been running frontwards?

A. I will have to understand you before I can answer. When we apply the reverse lever on the engine, that means to filled one and put it on there.

6024 Q. You know I don't mean that.

A. I know you don't mean that but I don't know exactly what you do mean.

6025 Q. Do you think it is your fault or mine?

A. It is your fault.

6026 Q. I mean when you run an engine, the engineer applies the reverse lever, that means to run her backwards?

A. No if you mean to reverse the engine I can tell you. If he reverses her, he would put the steam back.

6027 Q. When he reverses her what does he do?

A. Reverses the steam.

6028 Q. What does he do, take hold of the steam with his hands or a lever.

A. Take hold of the lever in the front position and puts it in the back position.

6029 Q. Then he reverses the lever?

A. Yes, sir.

701 6030 Q. When the lever is reversed what does he do?

A. Reverses the steam and moves the engine backwards, if you give her steam.

6031 Q. Now suppose the steam is applied frontwards and is not reversed?

A. Yes, why the engine will go ahead.

6032 Q. Suppose the engine runs backwards twenty-five feet what do you say?

A. When it is applied forward?

6033 Q. Yes?

A. She won't do it, she won't run backwards unless something starts it back.

6034 Q. If she runs backwards, the steam is applied backwards?

A. Not altogether so, it depends altogether on what you are getting at; there are several things will make the engine run backwards but not the steam.

6035 Q. If the steam is applied to run the engine forwards that is the way the engine runs isn't it?

A. That is the way she runs.

6036 Q. And if the engine runs backwards twenty-five feet, if that is true the natural supposition is that the steam is applied on the engine to run backwards?

A. That would be the natural supposition.

6037 Q. That is what I mean?

A. Yes, sir.

6038 Q. You don't know what was done. What time in the day did you examine these engines that day?

A. It was somewhere in the neighborhood of four-thirty I think, in the afternoon, I believe it was.

6039 Q. You were at Fairbury when the collision took place?

A. I was.

6040 Q. Where did you see engine 1486?

702 A. On the passing track at Lincoln.

6041 Q. Close to 1220?

A. About forty feet from 1220.

6042 Q. The water in 1486 had all run out?

A. Had all run out.

6043 Q. That was the reason she had to be pulled in?

A. That was the reason she had to be pulled in; she was dead.

6044 Q. If she had had water, she could have pulled herself?

A. She could.

6045 Q. Now with respect to running under control, don't you know that all railroads, with switch engines, when they go into a cut, have flagmen at both ends of the cut especially when they are working there, and no semaphores?

A. I don't know that.

6046 Q. Don't you know that the Burlington,—

A. I don't know anything about the Burlington.

6047 Q. You don't?

A. No, sir.

6048 Q. When you speak of crews of course regular trains don't make up trains in the track do they, regular engines pulling trains across the track?

A. They do sometimes.

6049 Q. But the rule is a switch engine?

A. Where there is a switch engine used.

6050 Q. That is what the switch engine is there for?

A. That is what the switch engine is there for.

6051 Q. You think the tank was thrown forward from seven to ten inches?

A. Yes, sir.

Redirect examination.

By Mr. Holmes for the defendant:

6052 Q. What are those jacks that are carried in cabooses  
703 and baggage cars, what are they?

A. Just a small screw jack for applying brasses to hot journals.

6053 Q. To lift up journals and put the brasses in?

A. Yes ten inches under.

6054 Q. That is what that is for, that little box that comes outside of each wheel?

A. Yes, sir.

6055 Q. What I understand you to say if after the collision 1486 went backwards and came forward again what was the cause of that?

Plaintiff objects as not proper re-direct.

(Question withdrawn.)

6056 Q. What was the cause of engine 1486 going away from the place of collision?

Plaintiff objects to that question as calling for an opinion and conclusion of the witness not a subject of expert testimony, incompetent, not proper re-direct.

6057 Q. And wasn't it a fact the impact, the collision gave momentum to the backward movement?

Plaintiff objects to that question as calling for an opinion and conclusion of the witness and not a subject of expert testimony, incompetent, not proper re-direct and further objection as leading and suggestive.

6058 Q. Can you state Mr. Oakford what caused that engine 1486 to rebound or move backwards under the circumstances shown in this case?

Plaintiff objects to that question for the reason, first that it does not reflect the evidence in this case, second, incompetent, irrelevant and immaterial and third not a subject of expert testimony, calling for an opinion and conclusion of the witness.

Overruled. Exception.

A. Yes, sir.

704 6059 Q. Did you understand my question as to what caused that engine to rebound?

Plaintiff objects as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness and the matter is not a subject of expert testimony, no proper or sufficient foundation laid, not properly reflecting the evidence in this case, the witness not there to see it.

Overruled. Exception.

A. Why the rebound after the impact.

6060 Q. The rebound.—That is all.

## Recross-examination.

By Mr. Berge for the plaintiff:

6061 Q. I suppose the reverse lever was applied, wouldn't that cause it to run backwards?

A. Why that would help it, certainly.

6062 Q. How is that?

A. Why that would help it, it would run all the faster.

6063 Q. Well the collision, you say, the rebound is what caused it to run backward?

A. Yes, sir.

6064 Q. And the reversal of the engine applying the reversed steam helped it you say?

A. Yes it would.

6065 Q. Suppose the engine had not bounded backward at all, what would you say?

Defendant objects as immaterial.

Overruled. Exception.

6066 Q. What would you say?

A. I would say it had not hit very hard.

6067 Q. How is that?

A. It did not hit very hard if it did not rebound a little.

705 6068 Q. You would say it had not hit very hard?

A. That is what I would say in answering your question, if she did not rebound at all.

6069 Q. Suppose the reverse lever had been applied and it had not hit very hard what would it do?

A. If you applied the reverse lever it don't do anything, the engine will stand still. I will answer that question, you put it to me,—It don't make any difference where he reverses the lever.

6070 Q. The reverse lever is applied to run it backwards?

A. No you said reverse lever, now if the steam was applied,—

6071 Q. If the steam was applied backwards, it would not stand still?

A. It would go backwards.

6072 Q. If it did not go backwards, what would the natural consequence be, would it show,—it would show the steam was not applied backwards, wouldn't it?

A. Why sure,—sure if you give her steam.

## Redirect examination.

By Mr. Holmes for the defendant:

6073 Q. If the engine came forward again after going backwards, it would show that the reverse was not put on the backward motion, wouldn't it?

A. It certainly would, it would show she was in the forward motion.

By Mr. Berge:

6074 Q. It would depend a good deal on how far it went forward or whether it went forward at all?

By Mr. Holmes: I am not through with my examination.

6075 Q. It would further show that the steam was put on the forward motion, wouldn't it?

Plaintiff objects as leading, an assumption, and not proper rebuttal.

706 Overruled. Exception.

A. It would show the steam was in the forward motion, if the engine returned again after it bounded back.

6076 Q. If it actually ran forward?

A. Yes sir.

Recross-examination.

By Mr. Berge for the Plaintiff:

6077 Q. But if it did not run forward, it would show the steam on backwards?

A. No sir, it would keep on going.

6078 Q. Suppose it did run twenty-five feet and say nothing more about it, it would show that the steam was on to run the engine backward?

A. No.

6079 Q. It might have been stopped some other way, I am not saying about that?

A. It surely was stopped some other way, or it would not stop.

6080 Q. If the engine in the collision stopped dead still, the steam would not be applied to run the engine backwards, would it?

A. Why no not necessarily.

Redirect examination.

By Mr. Holmes for the defendant:

6081 Q. Now Mr. Oakford if the emergency were applied on the engine and the pony trucks were off, what would be the effect, it would stand still, wouldn't it?

Plaintiff objects as leading and suggestive calling for an opinion and conclusion of the witness not proper re-direct.

Sustained. Exception.

6082 Q. What would you say Mr. Oakford would happen  
707 to an engine if the air had been applied to the forward motion, and the front trucks off?

Plaintiff objects as not proper re-direct and calling for an opinion and conclusion of the witness not a subject of expert testimony, incompetent.

Overruled. Exception.

A. It would take considerable steam to move that engine with the trucks on the ground, the brakes set; having a full head of steam will move her.

6083 Q. Proceeding at the rate of two and a half to five miles

an hour, would the steam turned on, to that extent, would that move it?

A. Well after she stops you mean?

6084 Q. Yes?

— Oh, no.

Recross-examination.

By Mr. Berge for the plaintiff:

6085 Q. If the trucks were off would she run backward twenty-five feet and then run forward again?

Defendant objects, I am talking about 1220.

By Mr. Berge: The witness has in mind 1486.

By Mr. Holmes: No and I think the jury understood it.

Witness excused.

B. J. SHAMP, being produced and duly sworn on behalf of the defendant testified as follows:

By Mr. Holmes for the defendant:

6086 Q. Where do you live?

A. 2836 Washington street, City.

6087 Q. In what business are you now Mr. Shamp?

A. Plumbing.

708 6088 Q. Were you ever an locomotive engineer?

A. Yes, sir.

6089 Q. In the employ of the Rock Island Company?

A. Yes, sir.

6090 Q. You are no longer in the employ of the company?

A. No, sir.

6091 Q. You left in good standing?

A. Yes, sir.

6092 Q. And were an engineer in good standing?

A. Yes, sir.

6093 Q. How long were you an engineer, Mr. Shamp?

A. Well between three and four years, if I remember right just about four years.

6094 Q. And have you run engines and locomotives through the Lincoln yards, down through the Holdredge street cut?

A. Yes, sir.

6095 Q. Were you ever an engineer on the local switch engine in this yard?

A. I was on that engine, well I should judge all told between two and one-half and three years.

6096 Q. You know you have been there a good many times have you not Mr. Shamp, the Holdrege cut and the curve at Holdrege street?

A. Yes.

6097 Q. Are you familiar with the meaning of the phrase "under full control"?

A. I think so, yes, sir.

6098 Q. You may tell the jury what that rule means?

A. Well under control means to be able to stop within a distance you can see the track to be clear ahead.

6099 Q. Now you may state what would be going under full control, going around this curve and through the cut in Holdrege street?

Plaintiff objects as calling for an opinion and conclusion  
709 of the witness on a matter that is not a subject of expert testimony, he has defined the meaning of "under control," and beyond that this expert witness can not go.

Overruled. Exception.

A. Why be able to stop there, I should not think a person would be absolutely under full control going over five miles an hour, six at the very outside, with brakes in perfect condition.

6100 Q. In that cut?

A. At any point in that cut, that is after you approach or get into the cut.

6101 Q. Why did you say it was unnecessary to run under five miles and hour?

Plaintiff objects as incompetent, immaterial, and irrelevant, proving no issue in the case, calling for a conclusion of the witness and because a matter not the subject of expert testimony and further asking for the reason why he has given his rule.

Overruled. Exception.

A. Because you can not see far enough around that cut to be able to stop going at a greater speed.

6102 Q. You were not in the employ of the company at the time this accident occurred?

A. Yes I was an employee of the company at the time it occurred.

6103 Q. You were not here?

A. No I were not here, I was at Fairbury if I remember right.

6104 Q. I neglected to ask you because I did not know whether you knew anything about it whether or not after the accident you examined the engines 1220 and 1486?

A. Yes, I did and I made a misstatement to the jury a few moments ago. I said I was at Fairbury, but I remember now that I was here; I had forgotten that at the time.

710 6105 Q. Did you assist Mr. Oakford in taking these engines to Fairbury?

A. Yes, I did.

6106 Q. You may state the condition that 1220 was in after the accident?

A. 1220, the front end, the smoke arch was pretty badly broken up, and the way I remember it that is about all that was the matter with 1220.

6107 Q. How about the pony trucks?

A. Well let us see, to tell the jury, I don't remember just the condition of the pony trucks under 1220.

6108 Q. When did you first see 1220?

A. After they had been brought into the yard, and they were setting in front of the pump station there.

6109 Q. Now did you see engine 1486?

A. Yes sir.

6110 Q. And what was the condition of 1486?

A. Well it much the same as 1220. The pilot and beam were broken off and there was something wrong with the pony trucks on one or other of the engines, I don't remember which.

6111 Q. Did you take 1486 to Fairbury?

A. Yes, we trailed it in, dragged it in behind 1220.

6112 Q. And you ran 1220 did you?

A. Yes sir.

### Cross-examination.

By Mr. Berge for the plaintiff:

6113 Q. You said a while ago to Mr. De Lacy that you left in good standing?

A. Yes sir.

6114 Q. You are in good standing yet?

711 A. As far as my railroading is concerned. I have got my letter at home that says I resigned of my own accord. It ought to be.

Witness excused.

712 J. J. BREHENY, being produced and duly sworn on behalf of the defendant, testified as follows:

Examined by Mr. Holmes for defendant:

6115 Q. Where do you live?

A. Fairbury, Nebraska.

6116 Q. Mr. Breheny, what official position do you hold with the Rock Island?

A. Road master.

6117 Q. How long have you been road master?

A. Four years.

6118 Q. On the Nebraska Division?

A. Three years on the Nebraska Division.

6119 Q. Three years on the Nebraska Division, that Division includes the Lincoln yards?

A. I have been on the Division that includes the Lincoln yards three years and a half.

6120 Q. Two years and a half?

A. Yes sir.

6121 Q. Are you familiar with the road bed, just state to the jury what a road master has to do?

A. Has to do with the maintainance and construction of the property.

6122 Q. Of the track?

A. Of the track, fences, drainage.

6123 Q. Bridges, and etc.?

A. Everything in connection with maintainance and construction.

6124 Q. Now, you are familiar with the tracks, more especially in the Lincoln yards?

A. Yes sir.

6125 Q. And you are over that part of the division almost every day?

713 A. Yes sir.

6126 Q. Will you tell the jury what per cent of grade is the road from where it crosses the Missouri Pacific railroad north of the city here onto that cut, on to around through the cut?

A. The grade is very nearly level from the Missouri Pacific up to Holdrege street, and then it raises going east to about two or three tenths of one per cent.

6127 Q. Two or three tenths of one per cent, for how long a distance?

A. Well, I would say for perhaps 1500 or 1800 feet.

6128 Q. Well, that two or three tenths of one per cent is per miles, is that the grade per mile?

A. Yes, based on the grade per miles. One per cent leaves 52.8 feet per miles, and this is two or three tenths of one per cent.

6129 Q. And that grade is going east from the viaduct?

A. Yes sir.

6130 Q. You are familiar with this cut out here in controversy in this case?

A. Yes sir.

6131 Q. Do you know what it means to be running under full control?

A. I do.

6132 Q. Will you state to the jury what that means?

Mr. Berge: If the question calls for a definition of the rule "under control" I have no objection.

Mr. Holmes: It calls for just what it does call for.

A. Prepared to stop short of any obstruction within your vision, shows you the track to be clear.

714 6133 Q. That is the definition?

A. In my judgment that is the definition of "under full control."

6134 Q. Now, Mr. Breheny, are you able to state what the maximum rate of speed should be in going around this curve in order to keep within that definition and being under full control?

Mr. Berge: The plaintiff objects to the question as calling for an opinion and conclusion of the witness, on a matter not the subject of expert testimony, having nothing to do with the application of the rule under the particular circumstances in this case and incompetent.

Overruled.

The plaintiff excepts.

A. I would say not to exceed five miles per hour.

6135 Q. And why would you say that?

Mr. Berge: The plaintiff objects to the question as calling for an opinion and conclusion of the witness, on a matter not the subject of expert testimony, having nothing to do with the application of the rule under the particular circumstances in this case and incompetent, and calling for the reasons for the definition that he has already given and self-serving.

Overruled.

The plaintiff excepts.

A. The distance you can see an obstruction or the track to be clear, is not a great deal and I would want to stop very quickly.

6136 Q. You are familiar, Mr. Breheny, with the required rates of speed on your Division?

A. I am.

715 6137 Q. I will ask you if it is a part of your duty to give orders as to rates of speed that trains shall maintain over your Division?

A. It is.

Cross-examination.

Examined by Mr. Berge for the plaintiff:

6138 Q. Two or three tenths of one per cent rise means how many feet in a mile?

A. .3 would mean 17 and a fraction.

6139 Q. 17 feet and a fraction?

A. Yes sir.

6140 Q. In a mile?

A. Yes sir.

6141 Q. Suppose you say .2s, what would it mean?

A. 10.4 feet.

6142 Q. A rise of ten feet in a mile?

A. Yes sir.

6143 Q. And we will take a distance of 500 feet, what difference would there be in the elevation?

A. Well, 500 feet is approximately .1 of a mile,—and .3,—

6144 Q. In figuring on the basis of .2?

A. .2 of 1% in a mile would be in round figures, 10 feet and .1 of that would be 1 foot.

6145 Q. That is, in 500 feet on a .2 per cent basis you would have a rise of one foot?

A. Just about that.

716 6146 Q. Of course,—where did you get your information about the rise there, is that your own knowledge or some surveyor's calculations that you have taken, how do you know that that is two or three tenths per cent?

A. About 14 years' experience will enable me to judge it very closely, and it is confirmed by engineer's work, too.

6147 Q. You base your testimony upon your experience as an engineer and looking at the grade?

A. Not as an engineer, no sir.

6148 Q. Well, as what?

A. As a maintenance or way man.

6149 Q. What I mean, your testimony is based not on actual measurement and calculation but on observation,—based on your experience that you have taken?

A. And confirmed with a little more information in connection with recent surveys and ballasting work we have done there, that I know the per cent of grade ran about that at that point.

6150 Q. You say you have charge of maintenance?

A. Yes sir.

6151 Q. That includes all equipment?

A. No sir.

6152 Q. You say you would not run more than five miles an hour in that cut?

A. For what purpose?

6153 Q. Running under control?

A. Yes sir.

6154 Q. A pretty sharp curve there?

A. Five per cent.

6155 Q. You cannot see over 200 or 300 feet can you around the curve?

717 A. Yes sir.

6156 Q. How far can you see?

A. It depends on where you stand.

6157 Q. Yes; owing to obstructions close to the track, and the embankment?

A. Somewhat, yes sir.

6158 Q. The curve itself is the same curve all the way around, is it, the five per cent curve from the time it starts until it winds up?

A. Supposed to be.

6159 Q. There is no more abrupt curve in one place than another, it is all the same curve, isn't it?

A. Supposed to be.

6160 Q. And if you can see farther in one place of the cut, than another it is owing to the embankment on the side, that is true isn't it?

A. Practically so, yes sir.

Witness excused.

It now being 11-45 A. M. March 22, 1911, an adjournment was taken until 2 o'clock P. M. same day.

2 o'clock p. m., March 22nd, 1911.

Court met pursuant to adjournment and the following proceedings were had and done.

718 W. E. BROWN, being produced and duly sworn on behalf of the defendant, testified as follows:

Examined by Mr. Holmes for the defendant:

6161 Q. Where do you live?

A. Fairbury, Nebraska.

6162 Q. What official position do you hold?

A. Civil engineer.

6163 Q. And where is your division?

A. My division is from Omaha to Phillipsburg, Kansas, and Horton, and Nelson.

6164 Q. You are familiar in your division of all the entire right of way of the Rock Island road?

A. Yes sir.

6165 Q. You are familiar with the cut out here?

A. Yes sir.

6166 Q. At Holdrege street, the one in controversy in this case?

A. Yes sir.

6167 Q. I wish you would state to the jury what the exact grade was of the railway just before you reach the viaduct going east on to that curve?

A. The grade just before you reach the viaduct, well, it was just about the time of this accident when I ran the levels over it, was practically a level grade up to within,—that is going east from the Missouri Pacific crossing up to the bridge, was practically a level grade up to within about 100 feet of the bridge.

6168 Q. Yes?

A. Then, it gradually changed, there was a gradual change of grade, it was about one-tenth of one per cent, one-tenth of a foot in 100 feet ascending grade going east. After you left the viaduct it was practically three-tenths of one per cent or three-tenths of a foot rise in 100 feet from there, approximately 1000 feet east of the viaduct.

6169 Q. So that at the point where the accident occurred was three-tenths, practically?

A. Yes sir.

Mr. Berge: He does not know where the accident was, objected to as assuming.

6170 Q. Do you know where the accident occurred?

A. I was shown where it occurred.

6171 Q. That is all you know about it?

A. Yes sir.

6172 Q. But the grade from the bridge on east 1000 is about three-tenths of one per cent?

A. Yes sir.

6173 Q. And it was so in December 8th, 1909?

A. Yes sir.

## Cross-examination.

Examined by Mr. Berge for the plaintiff:

6174 Q. When you say, "about," you mean not quite that much?

A. When I say "about" it was variable; in some places it was a little bit more than three-tenths of one per cent and at some places it was a little bit less than three-tenths per cent, the grade ascends in the track, that has been run over by engines is variable anywhere, that is, it is not exactly a theoretical, accurate grade.

Witness excused.

720 J. E. ODEY, being produced and duly sworn on behalf of the defendant, testified as follows:

Examined by Mr. De Lacey for the defendant:

6175 Q. Where do you live?

A. Fairbury.

6176 Q. What is your business?

A. I am a locomotive engineer on the Rock Island.

6177 Q. And are you at the present engaged as a locomotive engineer?

A. Yes sir.

6178 Q. Running what train?

A. I am at present on the Horton line, the Horton branch.

6179 Q. How long have you been a locomotive engineer?

A. About 23 years.

6180 Q. Have you ever run over an- through the Lincoln yards and through The cut at Holdrege street out here?

A. Yes sir.

6181 Q. How many time-, about, a great many?

A. Quite a number. I have been running off and on you may say for the past six years between here and Council Bluffs going on that.

6182 Q. Will you explain to the jury what the meaning of the term, "under full control" is?

A. Well, the term, "under full control" at that point—

6183 Q. No; the general meaning of the word, "under full control"?

A. In the distance that you can see the track to be clear.

6184 Q. In the distance within which you can stop?

A. Yes sir.

6185 Q. Now, you may tell the jury what would be under control, under full control running through the cut and around the curve at Holdrege street?

721 Mr. Berge: The plaintiff objects to the question in the form it is put as incompetent, irrelevant an- immaterial, and calling for an opinion and conclusion of the witness and not a subject of expert testimony, but an issuable fact to be determined from all the evidence in the case.

Overruled. The plaintiff excepts.

A. I would consider from three to five miles an hour, would be under full control.

6186 Q. That is going east?

A. Yes sir.

6187 Q. At any point of the curve?

A. Yes sir.

6188 Q. Then in your opinion, Mr. Odey, five miles an hour would be the maximum rate of speed at which you could run an engine on the east around that curve and be under full control?

Mr. Berge: The plaintiff objects as leading, suggestive, and calling for an opinion and conclusion of the witness and asking the witness to pass upon a question that is an issue of facts as to what would be "under control" and what would not and not for a definition of the phrase "under control" as commonly understood by railroad men, incompetent, irrelevant and immaterial and an opinion and conclusion of the witness.

Cross-examination.

722 Examined by Mr. Berge for the plaintiff:

6189 Q. Now, that of course, applies to an engine running either way, that you have testified to?

A. Applies to an engine running either way?

6190 Q. In that cut, yes. Either running northward or southward?

A. It does, yes sir.

Witness excused.

723 MILO ENYARD, being produced and duly sworn on behalf of the defendant, testified as follows:

Examined by Mr. De Lacey for the defendant:

6191 Q. Where do you live?

A. Fairbury.

6192 Q. Are you employed by the defendant Company at the present time, the Rock Island?

A. Yes sir.

6193 Q. In what capacity?

A. Locomotive engineer.

6194 Q. How long have you been a locomotive engineer?

A. Four and a half years.

6195 Q. And you was a fireman before that?

A. Yes sir.

6196 Q. How long have you been in the service of the Rock Island all together?

A. Well, six and a half years.

6197 Q. Have you ever run through the Lincoln yards and through the cut out there at Holdrege street and around that curve?

A. Yes sir.

6198 Q. Operated a locomotive engine around it?

A. Yes sir.

6199 Q. A great many times or a few times?

A. Oh, a great many times.

6200 Q. You may tell the jury what the meaning of the term "under full control" is?

A. To be able to stop just in the track known to be clear.

6201 Q. That rule applies to obstruction such as moving trains and as well as permanent obstructions, doesn't it?

724 Mr. Berge: The plaintiff objects as leading and suggestive.

A. Yes sir.

Objection sustained. The defendant excepts.

6202 Q. You may tell the jury what, in your opinion, would be running under full control, running an engine from the east through the cut and around the curve at Holdrege street?

Mr. Berge: The plaintiff objects as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness and not a subject of expert testimony and in effect asking the witness to pass upon a question that is an issue of fact in this case.

Overruled. The plaintiff excepts.

A. Why, not to exceed five miles an hour at the most.

6203 Q. That would be the maximum rate of speed?

A. Yes sir.

6204 Q. Under that speed your engine would be under full control?

Mr. Berge: The plaintiff objects as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness and not a subject of expert testimony and in effect asking the witness to pass upon a question that is an issue of fact in this case.

Sustained. The defendant excepts.

Cross-examination.

725 Examined by Mr. Berge for the plaintiff:

6205 Q. That would apply to a train running either way, to an engine running either way?

A. Yes sir.

Witness excused.

726 JOHN T. McLEAN, being produced and duly sworn on behalf of the defendant, testified as follows:

Examined by Mr. De Lacey for the defendant:

6206 Q. You are in the employ of the defendant company?

A. Yes sir.

6207 Q. Where do you live?

A. Fairbury, Nebraska.

6208 Q. You are employed in what capacity?

A. Locomotive engineer.

6209 Q. How long have you been a locomotive engineer?

A. Since September 25th, 1900.

6210 Q. Prior to that time had you been a fireman?

A. Yes sir.

6211 Q. In the employ of the Rock Island?

A. Yes sir.

6212 Q. Have you operated through the Lincoln yards and around the cut at Holdrege street, operated an engine through there?

A. Yes sir.

6213 Q. Do you know what the term, "under full control" means?

A. Yes sir.

6214 Q. Tell the jury?

A. Able to stop the distance the track is seen to be clear.

6215 Q. Tell the jury what in your opinion would be the maximum speed at which you could operate an engine around through the curve at Holdrege street and have that engine under full control?

Mr. Berge: The plaintiff objects as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness, and a matter that is a subject of expert testimony and asking the witness to define full control under a certain set of circumstances which is an issuable fact, not to be determined only from the testimony.

Overruled. The plaintiff excepts.

A. Well, to be under full control at that point there, I would not want to go over five miles an hour and consider I was under full control.

By Mr. Berge:

6216 Q. That would apply to a train running either way?

A. Yes sir.

Witness excused.

728 Mr. Holmes: The defendant now offers in evidence exhibits "23" and "24" being blue prints. Exhibits "23" and "24" received in evidence, attached hereto at bill of exceptions and made a part hereof.

(The same offered before,—see index.)

The defendant rests.

Mr. Holmes: The defendant Company now moves the Court to direct a verdict in favor of the defendant and against the plaintiff on the evidence now being adduced and each part having rested their case for the following reasons, to-wit:—

1. The evidence of the plaintiff is insufficient upon which to base a verdict against the defendant.

2. The evidence of the defendant fails to establish any act or acts of negligence on the part of the defendant Company whereby any verdict for damages against the defendant could be based.

3. For the reason that the evidence of the plaintiff shows that it

was the gross negligence of the plaintiff's decedent that resulted in his death.

4. That the plaintiff's evidence established the fact that it was the negligence of the plaintiff's decedent that was the approximate cause of plaintiff's decedent's death.

729 5. That the evidence is so far as the fact that the death of the plaintiff's decedent was caused by no act of negligence on the part of said defendant Company or that of its employees, but was the result of the decedent's neglectful violation of rules promulgated and published by defendant Company, and of which the decedent had knowledge and which rules were so promulgated and published by the defendant Company for the purpose of protecting the safety of its passengers and its employees.

6. That the evidence establishes the fact to be that had plaintiff's decedent obeyed all of the rules of said defendant Company governing the operation of its engines, and of which decedent had knowledge, and more especially Rule 16 or Time table 11-B, and rule 97-A of the book of Rules, the accident complained of by which decedent met his death could not have happened.

7. For the reason that there is no evidence of negligence on the part of the defendant Company and hence no question of comparative negligence arising or can be submitted to the jury.

8. For the reason that under the evidence offered by the plaintiff there is no question of fact to be submitted to the jury where by the jury could base a verdict against the defendant Company.

9. For the further reason that from the evidence of plaintiff, as a matter of law the plaintiff's action will not lie against the  
730 defendant company.

Mr. DeLacey: And for the further reason that the evidence of the plaintiff discloses that the engine operated by Mr. Wright was running at the rate of ten miles an hour, and that an engine running at that rate of speed at that point was not under full control, and that the decedent in operating said engine at said speed was guilty of gross negligence which bars his recovery, and was guilty of negligence greater than the negligence, if any, on the part of the defendant Company. And for the further reason that the evidence fails to disclose any negligence on the part of the defendant or its agents or its employees. And for the further reason that the evidence now shows that neither the defendant Company nor its agents nor employees were guilty of any negligence whatsoever, but that the said Otto O. Wright was guilty of contributory negligence which proximately caused his death.

And for the reason that the negligence of the defendant's agents or employees, if any, has been shown, was not the proximate cause of the injury to the said Otto O. Wright, but that said injury was the result of the contributory negligence of the said Otto O. Wright.

Overruled.

The defendant excepts.

Testimony closed.

731 I, Edwin R. Mockett, one of the stenographic reporters, in and for the third judicial district of Nebraska, hereby certify that the above and foregoing is a true transcript and bill of exceptions of the evidence offered and given by the respective parties on the trial of the above entitled cause, together with all objections of the said parties, the rulings of the court thereon, and the exceptions of the said parties thereto, according to my skill.

EDWIN R. MOCKETT, *Reporter.*

Fees for Bill of Exceptions \$168.50.

Paid By ———.

Date ———, ———.

———, *Reporter.*

732-754 In the District Court of Lancaster County, Nebraska.

LIZZIE L. WRIGHT and HENRY C. BERGE, Adm., Plaintiff,

vs.

C., R. I. & P. Ry. Co., Defendant.

And the defendant in the above entitled cause, in the district court of Lancaster County, third judicial district of Nebraska, having within the time heretofore allowed by the court for that purpose, reduced to writing, in this its bill of exceptions, all the testimony and evidence adduced or offered on both sides of the before named cause, in the before named court, all of the objections, with the grounds therefor, made to the admission of testimony and evidence, all of the rulings of court on such objections, and all of the exceptions to such rulings made and taken at the time, and having served the same on the attorneys for the above named plaintiff, according to law, for examination and amendment; and the said bill of exceptions being now here before me the undersigned judge, before whom said cause was tried, on motion of the attorneys for the defendant that the same may be settled, allowed, signed, sealed, and made a part of the record in said cause in the said court.

Now I, the said judge, do hereby certify that this bill of exceptions contains all of the testimony and evidence adduced or offered by the plaintiff- and defendant on the trial of said cause, all of the objections to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions taken to such rulings at the time, and I do hereby order that it be made a part of the said record in the said cause in the said court.

Done at Lincoln, Nebraska, this 6th day of June 1911.

LINCOLN FROST, *Judge.*

Endorsed: Supreme Court of Nebraska. Filed Jun- 6 1911. H. C. Lindsay, Clerk.

755 And on the same day, there was made to issue out of the office of the clerk of said Supreme Court, a certain Notice of Appeal in the words and figures following, to-wit:

*Notice of Appeal.*

THE STATE OF NEBRASKA, ss:

To the Sheriff of the County of Lancaster:

You are hereby commanded to notify Lizzie L. Wright, and Henry C. Berge, Administrators of the estate of Otto O. Wright, deceased, that an appeal has been taken to the Supreme Court of the State of Nebraska by Chicago, Rock Island & Pacific Railway Company, a corporation asking the reversal of a judgment against it rendered on the 22 day of March A. D. 1911, in a certain cause in the District Court of Lancaster County, wherein Lizzie L. Wright et al. were Plaintiffs, and Chicago, Burlington & Quincy Railway Company was Defendant.

You will make due return of this notice on or before thirty days after the date hereof.

Witness my hand and the seal of said Court, at the City of Lincoln, this 6th day of June 1911.

[SEAL.]

H. C. LINDSAY, *Clerk*,

By VICTOR SEYMOUR, *Deputy*.

Endorsed: General No. 17189. Supreme Court, State of Nebraska. Wright — C. R. I. & P. R. Co. Notice of appeal. June 6, 1912, fixed as Rule Day, as provided for under Rule Nine. H. C. Lindsay, Clerk.

756 And afterwards, to-wit, on the 7th day of June, 1911, the said Notice of Appeal theretofore issued out of the office of the clerk of said supreme court was returned and filed in the office of said clerk with service acknowledged thereon in the words and figures following, to-wit:

Service of the within Notice of Appeal acknowledged this 6th day of June, 1911.

LIZZIE L. WRIGHT ET AL., Adm'x,

*Appellees.*

By G. W. BERGE, *Attorney*.

Supreme Court of Nebraska. Filed Jun- 7, 1911. H. C. Lindsay, Clerk.

757 And on the 3rd day of June, 1912, there was filed in the office of the Clerk of said Supreme Court the printed briefs of the Chicago, Rock Island & Pacific Railway Company, appellant herein. Said briefs containing among other things the assignments of error made by said appellant. The said assignments

of error appearing on pages three to seven in said briefs, are in the words and figures following, to-wit:

- I. The verdict of the jury is not supported by the evidence.
- II. The verdict is contrary to law.
- III. The court erred in not sustaining defendant's motion to direct a verdict at the close of plaintiff's case.
- IV. The court erred in not directing a verdict at the close of defendant's case.
- V. The court erred in giving instruction No. 1 given by the court.
- VI. The court erred in giving instruction No. 2 given by the court.
- VII. The court erred in giving instruction No. 3 given by the court.
- VIII. The court erred in giving instruction No. 4 given by the court.
- IX. The court erred in giving instruction No. 5 given by the court.
- X. The court erred in giving instruction No. 6 given by the court.
- XI. The court erred in giving instruction No. 7 given by the court.
- XII. The court erred in giving instruction No. 8 given by the court.
- 758 XIII. The court erred in giving instruction No. 9 given by the court.
- XIV. The court erred in giving instruction No. 10 given by the court.
- XV. The court erred in giving instruction No. 11 given by the court.
- XVI. The court erred in giving instruction No. 12 given by the court.
- XVII. The court erred in giving instruction No. 13 given by the court.
- XVIII. The court erred in giving instruction No. 14 given by the court.
- XIX. The court erred in giving instruction No. 15 given by the court.
- XX. The court erred in giving instruction No. 16 given by the court.
- XXI. The court erred in giving instruction No. 17 given by the court.
- XXII. The court erred in refusing to give instruction No. 1 requested by defendant.
- XXIII. The court erred in refusing to give instruction No. 2 requested by defendant.
- XXIV. The court erred in refusing to give instruction No. 3 requested by the defendant.
- XXV. The court erred in refusing to give instruction No. 4 requested by the defendant.

XXVI. The court erred in refusing to give instruction No. 5 requested by the defendant.

XXVII. The court erred in refusing to give instruction No. 6 requested by the defendant.

759 XXVIII. The court erred in refusing to give instruction No. 7 requested by the defendant.

XXIX. The court erred in refusing to give instruction No. 8 requested by the defendant.

XXX. The court erred in refusing to give instruction No. 9 requested by defendant.

XXXI. The court erred in refusing to give instruction No. 10 requested by defendant.

XXXII. The court erred in refusing to give instruction No. 11 requested by defendant.

XXXIII. The court erred in refusing to give instruction No. 12 requested by defendant.

XXXIV. The court erred in refusing to give instruction No. 13 requested by the defendant.

XXXV. The court erred in refusing to give instruction No. 14 requested by defendant.

XXXVI. The court erred in refusing to give instruction No. 15 requested by the defendant.

XXXVII. The court erred in refusing to give instruction No. 16 requested by the defendant.

XXXVIII. The court erred in refusing to give instruction No. 17 requested by the defendant.

XXXIX. The court erred in refusing to give instruction No. 18 requested by the defendant.

XL. The court erred in refusing to give instruction No. 19 requested by the defendant.

XLI. The court erred in refusing to give instruction No. 20 requested by the defendant.

760 XLII. The court erred in refusing to give instruction No. 21 requested by defendant.

XLIII. The court erred in refusing to give instruction No. 22 requested by defendant.

XLIV. The court erred in refusing to give instruction No. 23 requested by the defendant.

XLV. The court erred in refusing to give instruction No. 24 requested by the defendant.

XLVI. The court erred in refusing to give instruction No. 25 requested by the defendant.

XLVII. The court erred in overruling defendant's motion for a new trial.

XLVIII. Said verdict is grossly excessive and is the result of passion and prejudice.

XLIX. The court erred in not granting a new trial because of the excessiveness of the verdict.

XLX. The court erred in submitting the cause to the jury upon the theory that a recovery was permissible under the Nebraska Employer's Liability Act, when the evidence disclosed that the de-

cedent was running from Fairbury, in Nebraska, to Council Bluffs, in Iowa, and was engaged in interstate commerce at the time of his injury and the said cause should have been tried under the Federal Employer's Liability Act.

XLXI. The court erred in not holding that the decedent did not assume the risks arising from a collision with the switch engine and that no recovery was permissible.

761 And afterwards, to-wit, on the 20th day of December, 1912, there was filed in the office of the clerk of said supreme court, a certain Motion with Notice and Proof of Service thereof, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

LIZZIE L. WRIGHT et al., Plaintiffs and Appellees,  
vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a  
Corporation, Defendant and Appellant.

*Motion.*

Come now the appellees and move the court for an order giving appellees until April 1st, 1913, to file their briefs in this cause. The clerk of this court estimates that the case will not be reached until May, 1913.

LIZZIE L. WRIGHT ET AL.,  
By G. W. BERGE, *Their Attorney.*

762 Copy of the above motion received this 20 day of December, 1912, and the same may be submitted at the next sitting of this court without further notice on Jan. 7, 1913.

HOLMES & DE LACY,  
*Attorneys for Appellant.*

Endorsed: 17189. In the Supreme Court of Nebraska. Lizzie L. Wright et al., Plaintiffs and Appellees vs. The Chicago, Rock Island and Pacific Railroad Company a Corporation, Defendant and Appellant. Motion of Appellees for extension of time to file briefs. Supreme Court of Nebraska. Filed Dec. 20, 1912. H. C. Lindsay, Clerk. George W. Berge, Attorney for Appellees.

And afterwards, to-wit, on the 7th day of January, 1913, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1913, Jan. 7.

No. 17189.

LIZZIE L. WRIGHT et al., Appellees,  
v.  
CHICAGO, R. I. & P. R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon motion of appellees to extend time to April 1, 1913, within which to serve and file briefs, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and the same hereby is, sustained, and appellees given until April 1, 1913, to serve and file answer briefs herein.

M. B. REESE,  
*Chief Justice.*

And afterwards, to-wit, on the 7th day of April, 1913, the following among other proceedings were had and done in said supreme court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1913, Apr. 7.

The following causes were argued by counsel and submitted to the Court:

\* \* \* \* \*

No. 17189.

WRIGHT  
v.  
CHICAGO, R. I. & P. R. Co.

Appeal from Lancaster County.

\* \* \* \* \*

M. B. REESE,  
*Chief Justice.*

And afterwards, to-wit, on the 26th day of September, 1913, there was rendered by said supreme court, a certain Judgment in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1913, Sept. 26.

No. 17189.

LIZZIE L. WRIGHT et al., Appellees,  
v.  
CHICAGO, R. I. & P. R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find no error apparent in the record of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged that said judgment of the district court be, and the same hereby is, affirmed; that appellees pay all costs incurred herein by them,  
764      taxed at \$—, and have and recover from appellant all their costs so expended; that appellant pay all costs incurred herein by it, taxed at \$—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

M. B. REESE,  
*Chief Justice.*

And on the same day, there was filed in the office of the clerk of said supreme court, a certain Opinion of said Court, and a dissenting opinion of Hamer, J., which opinion and dissent thereto are in the words and figures following, to-wit:

765

No. 17189.

WRIGHT  
v.  
CHICAGO, R. I. & P. R. Co.

*Opinion Filed Sept. 26, 1913.*

1. A railroad company has a right and it is its duty to make reasonable rules for the protection of the safety of its employes, and such rules its employes are bound to regard and obey; but whether or not any particular rule, under the circumstances shown, is sufficient and adequate for the safety of the company's employes, is a question of fact for the jury.

2. Under the rules of the defendant company, the switch engine in its Lincoln yards had the right to occupy the main track, protecting itself against overdue trains. The extra, which was being run by plaintiff's decedent, was required to proceed through the yard under full control, and protect itself within yard limits. The switch engine having the right of way over the extra, it was the duty of the decedent

to be on the lookout for the switch engine and to take such precaution as the situation demanded to prevent a collision; but this did not relieve the crew of the switch engine from the exercise of ordinary care in avoiding a collision with the extra, which they knew had entered the yard.

3. The uncontradicted evidence shows that the defendant company, at and prior to the collision which caused the death of plaintiff's decedent, had not promulgated any written or printed rules regulating the rate of speed at which the switch engine might  
766 be run in its yards. Held, that it was for the jury to say whether or not, under the circumstances shown, the failure of the company to adopt and promulgate such a rule was negligence on its part.

4. There being no evidence in the record tending to show negligence on the part of plaintiff's decedent, the question of contributory negligence does not arise.

5. The evidence shows that the decedent was a man of good health, 32 years of age; that he was earning from \$125 to \$150 per month; that his expectancy, according to the Carlisle table, would be 32 years. Held, that we cannot say that \$15,000 is an excessive judgment under these circumstances.

6. Plaintiff's decedent was running a lone engine, as an extra, from one point to another in this state, not in connection with any cars. Held, that he was not engaged in interstate commerce.

767 7. Instructions complained of and set out in the opinion, examined and held free from prejudicial error.

8. The evidence examined and set out in the opinion, held sufficient to sustain the verdict and judgment.

768 FAWCETT, J.:

From a judgment for \$15,000 in favor of the plaintiffs on account of the alleged negligence of the defendant in causing the death of Otto O. Wright, husband of plaintiff Lizzie L. Wright, defendant appeals.

The abstract contains 86 printed pages, the supplemental abstract 201 pages, the brief and reply brief of appellant 139 pages, and the brief of appellee 90 pages. To follow counsel through this voluminous record and through their equally voluminous briefs, would necessitate an opinion of such length that it would be useless to the profession for the reason that no lawyer would ever read it. We shall, therefore, deal directly with the material issues in the case.

Otto O. Wright was an engineer in the service of defendant. At the time set out in the pleadings he was ordered to run an engine, No. 1486, as "an extra" from Fairbury to Albright, both points in Nebraska. In making this run he was required to pass through the city of Lincoln. After leaving the station at Lincoln, and while running north through the company's yards, at a point a short distance from the Holdrege street viaduct, this extra collided with the company's switch engine No. 1220, which was used by the defendant in its Lincoln yards for switching purposes, causing the death of Mr.

Wright. These two engines will hereinafter be referred to by their respective numbers. The point where the collision occurred was in a cut and on a curve. The controlling, and in fact the only real question involved in this case, is, who was to blame for this collision?

It is shown that the defendant had rules for the guidance of its employes, including engineers. On its printed time-tables, such as were then used by engineers, rule 16 provided: "All except first class trains will approach, (enter, and pass though the following named yards under full control), expecting to find main track occupied or obstructed. Albright, Fairbury, Lincoln, Belleville, Jansen, Phillipsburg." Subdivision *b* of rule 9 provided: "The Speed of trains in the city of Lincoln between M street (two blocks west of passenger station) and Vine street (east of coal dock) must not exceed six miles per hour." Rule 97*a* in the book of rules promulgated by defendant provided: "Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks, protecting themselves against overdue trains. Extra trains must protect themselves within yard limits." The term, "under full control," in rule 16, all of the witnesses testified means "to be able to stop within the vision of the engineer." It is conceded that 1486 was required, while passing through the company's yards in the city of Lincoln, to proceed under such control. It is uncontradicted that the defendant had no written or printed rule relating to the rate of speed at which its switch engines might run within its yards. There is some testimony to the effect that there was some sort of an unwritten rule or understanding that switch engines should also be run under full control, but the evidence is entirely satisfactory, and not contradicted by any testimony offered by defendant, that defendant's switching crew did not consider that it was bound by any such rule, except as to that portion of the Lincoln yard between M and Vine streets, which portion was not only covered by subdivision *b* of rule 9, but also by a city ordinance. Defendant in its brief urges 13 assignments of error, which we will consider in their order:

The first assignment is that the verdict is not sustained by sufficient evidence. In considering this assignment the place where the collision actually occurred is important. There is a viaduct on Holdredge street at the place where that street is intersected by defendant's track. Holdredge street runs east and west. The collision occurred north of the viaduct. 1486 was running north, and 1220 south. In going north, after leaving the viaduct, the track curves to the east in a cut. The collision occurred in that cut. The point where the collision occurred is testified to by the engineer, fireman, switch foreman and two of the switchmen who were riding on 1220; McLane, the fireman on 1486, and by four witnesses who resided in the immediate vicinity, and who visited the scene immediately after the collision. All of these witnesses locate the point of the collision as right opposite or a few feet south of a barn standing on the first lot east of the track, which lot faces south on Holdredge street. This lot is 135 feet in depth. The four residents

of the vicinity locate the collision a little south of the barn.

771 McKinstry, a switchman on 1220, says that 1486, after the collision, was about 35 or 40 feet south of the building shown in the Photograph, which is the barn referred to. Some of the switching crew testify that the collision occurred about 150 feet north of the viaduct. This testimony, however, was simply the opinion of the witnesses so testifying. This testimony cannot be considered in the face of the large number of witnesses whose uncontradicted testimony locates the exact place where the collision occurred in front or a few feet south of a fixed object or point by the side of the track. Considering, therefore, the length of the lot upon which the barn stood and the point in relation thereto, where these residents show the collision occurred, there is no escape from the conclusion that the collision actually occurred at a point about 100 feet north of the viaduct. It is admitted that all of the members of the switching crew knew that the extra 1486 was in the yard. McKinstry, the switchman above referred to, was the first to discover that the two engines were running towards each other on the main track. He testifies that he immediately gave the alarm. The men on 1220 testify that when McKinstry gave the alarm the engineer threw on the emergency brake. When 1220 had run about 75 or 100 feet McKinstry and some of the others jumped from the engine. All of the crew, including the engineer, jumped, but whether the others jumped at the same time McKinstry and Carr did, is not shown. Possibly the engineer remained on a little longer. According to McKinstry and Carr, 1220 proceeded about 25 feet after they jumped, before the collision occurred, so

772 that, according to their testimony, 1220 proceeded about 100 feet after McKinstry gave the alarm, before the collision occurred. Some of the witnesses on 1220 testify that at the time McKinstry gave the alarm 1220 was running from three to five miles an hour; others say from three to four miles an hour: yet McKinstry and Carr both say that when the collision occurred 1220 was going "not to exceed three miles an hour." The witness Palmer, engineer on the company's switch engine at the time of the trial, testified that he was familiar with engine 1220 and had run it; that an engine running at a rate of five miles an hour ought to be stopped in 20 feet; at 10 miles an hour in 30 feet; at 15 miles an hour in 45 feet, and at 20 miles an hour in 60 feet. This testimony stands uncontradicted. It is thus clearly established that 1220 must have been running at a high rate of speed, or, that the emergency brake was not applied and the engine reversed before the crew jumped from the engine. It is testified to by some of the crew of 1220, and conceded in the brief of defendant, that at the time McKinstry discovered 1486 approaching, it was at least 50 feet north of the viaduct. That fact being established, and also the fact that the collision occurred not over 100 feet north of the viaduct, it stands established as a fact that 1486 did not run to exceed 50 feet after its engineer Wright discovered the approach of 1220. A photograph introduced in evidence was taken at a point 420 feet north of the viaduct. It shows the barn above referred to, the cut and curve,

773 and the rails of the track from that point to the viaduct, and clearly shows that at any point within that 420 feet two engines approaching from opposite directions would have a clear view of each other. 1486 being 50 feet north of the viaduct, it is beyond question that the point of view in the photograph could have been extended that number of feet further north, so that there was a clear, open view of the track for the entire distance of 420 feet when the engines came within the vision of the two engineers. Of that 420 feet 1486 only traveled about 50 feet when the collision occurred, while 1220 traveled 370 feet. As we view the record, there is no escape from these facts. This being true, then the conclusion is irresistible that the engineer of 1486 was proceeding north with his engine under full control; that the engineer of 1220 was proceeding south with his engine not under full control, but traveling at such a rate of speed that he was unable to stop it within a distance of 370 feet, and that, even after traveling that distance, his engine was still going at the rate of two or three miles an hour. Mr. Burleigh, trainmaster for the Nebraska division of the defendant road, was called as a witness by defendant. Defendant's abstract of Mr. Burleigh's testimony sets out only that part showing that engineers were examined by him as to their fitness, and as to the published book of rules; that he had examined Wright; that Wright had a clear understanding of the rules; that he informed Wright that switch engines had a right over all except first-class trains in yard, and that other trains would have to look out for them; that

774 he read the rules to Wright who gave him his understanding of the same as they were read; that Wright gave as his understanding of the term, "under full control," as meaning "to run at a speed which would make it impossible for two trains coming in opposite directions to collide with one another." That is not the meaning given by any other witness. If that be the meaning of the term, you could not run an engine at all without having a flagman in advance to warn you of approaching trains. An important part of Mr. Burleigh's testimony, not set out in defendant's abstract, appears in plaintiff's supplemental abstract: "Q. When you say you examine men for switch engines, do you use these rules? A. Yes, and the time tables. Q. You tell switch engine men that they have a right to run 25 miles an hour in the yards? A. Yes, sir. Q. You tell them that? A. If they want to—I don't tell them anything about running. Q. How is that? A. I don't tell them anything about how fast they shall run, or how slow. Q. You understand, of course, that they can at any time run their engines negligently? A. I understand that, yes."

Mr. Carr, the switch foreman, testified that when they went around that curve they always slowed up to save steam. "Q. But you went on the theory and assumed the right that everything had to get out of the way for you except this passenger? (By the term "this passenger" the questioner meant a passenger train which was due to pass through a few minutes prior to the time of the collision, but which train was some 12 or 15 minutes late.) A. Yes, sir. Q.

775 Although you knew the extra was in the yards? A. Yes, sir. \* \* \* Q. Have you any rule applying to switch engines about running under control? A. No. sir." It will be seen, therefore, that in the defendant's yard the switch engine was a free lance as against all except first-class trains.

The second assignment is that the court erred in submitting the sufficiency and reasonableness of the company's rules to the jury. In the instructions complained of the court told the jury that the question as to whether the defendant was negligent in one or more respects alleged in the petition, as set out in subdivisions *a*, *b*, *c* and *d*, of the first paragraph of the instructions, which stated the allegations of the petition, "is one of the material elements of plaintiff's cause of action to which the jury should direct their attention in determining upon their verdict. Negligence may be defined as the omission to do something which a reasonable man guided by those conditions which ordinarily regulate the conduct of human affairs would under the circumstances do, or doing something which a reasonable man would not do under the circumstances. In other words, negligence is the absence of care according to the circumstances." By instruction No. 8 the court instructed the jury: "Touching subdivision (*a*) of the first paragraph of these instructions you are further instructed that it was the duty of the defendant company to exercise reasonable care to adopt and promulgate reasonable rules for the control and conduct of its business in all cases, in case its business had become sufficiently extensive to demand their adoption in the exercise of reasonable care for the protection of its employees. In this connection you are further instructed to

776 determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries." Instruction No. 10: "You are instructed that under the rules of the company the light engine which was being run by plaintiff's intestate as an extra, was required to run and pass through the Lincoln yards 'under full control.' It is for you to say from the testimony what the term 'under full control' means, and then to apply your interpretation to the rules of the defendant company in which the term is used and also to the acts of Otto O. Wright, in compliance with or failure to comply with such rules in determining whether his acts were in compliance with or in violation of defendant's rules." Instruction No. 11: "If you find from the evidence, that the defendant was negligent in one or more of the particulars alleged, and as set out in the first paragraph of these instructions, and if you further find from the evidence that such negligence proximately contributed to the injury of plaintiff's intestate, then you should direct your attention, among other things, to the defendant's claim that plaintiff's intestate was negligent and also that he assumed the risks of his employment." The gist of defendant's complaint as to the foregoing instructions is that they submitted to the jury the reasonableness and

777 sufficiency of the rules governing the operation of the switch engine in its yards. A number of authorities are cited by defendant in support of its contention. While we concede that in the main they sustain defendant's point that the reasonableness and, in some cases, the sufficiency of the rules are questions of law for the court, and not for the jury, this is not by any means the universal rule.

In *Southern R. Co. v. Craig*, 113 Fed. 76, the syllabus holds: "1. Plaintiff's intestate, a railroad conductor on an extra train, had orders to precede a delayed regular train into defendant's yards. No instructions were given to look out for any other train on entering the yards. Intestate was killed in a collision with a switching engine in the yards. No notice of the approach of the extra train had been given to those on the switch engine (in this case the switching crew had full notice of the presence of 1486 in the yard). The company's rules, known to intestate, gave the right of way to switch engines in the yards, and required that extra trains must approach and run through yard limits under full control. The evidence as to whether intestate's train was under full control was conflicting. The night of the accident was shown to have been dark and foggy. Held, that, notwithstanding the rules of the company, it was the duty of the crew of the switching engine to exercise ordinary care in avoiding collisions with incoming trains. 2. An instruction that the crew of the switching engine should take proper precautions against collisions with incoming trains, the character of such precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals, was correct. 3. The question as to whether intestate observed the rule of having his train under full control on entering the yards was for the jury." In that case the company requested the following instruction: "Under the rules the switch engine had the right to the use of the main line, protecting itself against only regular trains. The extra was required to proceed through the yard under full control. This requirement applied, not only to the speed of the train, but to such precautions in addition as the dark and foggy night demanded. The switch engine, having the right of way over the extra, it was the duty of the other to be on the lookout for the switch engine, and to take such precautions as the situation demanded to prevent a collision." The trial court modified the instruction by adding: "Yes, but it did not relieve the switching engine from the exercise of ordinary care in avoiding collisions with trains entering the yard." The defendant requested this instruction: "The rules of the company do not require notice of the movements of extra trains to be given to the crew of a switch engine working within the yard limits, and it is not negligence on the part of the defendant not to have given such notice," which the trial court modified by adding, "But the crew of the switching engine should take all proper precautions against collisions with trains entering the yard, the character of these precautions to be determined by the circumstances of the night, the heavy

fog, and the difficulty in hearing and seeing signals." In the opinion the court say (p. 79): "We find no error in the modifications made by the court in giving the instructions requested. After giving the first instruction requested, the court simply said, in substance, that it was the duty of the switching engine to exercise ordinary care in avoiding collisions with trains entering the yard. We cannot conceive of any circumstances under which the operators of a railroad train are relieved from the use of ordinary care to prevent collisions with other trains. This is a duty that devolves upon those running and operating trains at all times. What constitutes ordinary care depends upon the relationship of the parties and the circumstances under which they act, and what would be ordinary care or common prudence under certain conditions would not be under others." The judgment of the trial court was affirmed. We think this reasoning is eminently sound, and its application to the switching crew in charge of 1220 is apparent. They knew the extra was in the yard. They had been expressly notified of that fact. They knew that when the extra moved further through the yards it would be running on the main track, and for them to run their engine upon the main track, around the curve and through the cut at the rate of speed at which they were unquestionably running, was a reckless disregard of the lives of those upon the engine of the extra. That they knew they were liable to meet the extra is shown by what switchman McKinstry said when he saw 1486 coming. His language was: "Get off; here comes that extra. \* \* \* Q. Let me refresh your memory; did you say, 'There she is?' Did you use that language? A. I don't know whether I did or not. Q. How? A. I don't know whether I did or not; I just told them to get off. 'There comes the extra.'" A rule that a switch engine may run through the yards, on the main line, not under control but at a high rate of speed, when its crew all know that there is an "extra" on the main line passing through the yards, would be a barbarous rule; and, if the rules of a railway company permit such a practice, it should be held liable for injuries to employees on the extra who are injured while such extra is being operated in compliance with the rules of the company, viz: under full control. If the reasonableness of a rule is for the court and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable. Submitting the question to the jury in such a case could not, therefore, prejudice defendant.

Directly upon the question of submitting to the jury the sufficiency of the company's rules, *Texas & P. R. Co. vs. Cumpston*, 40 S. W. 546, (15 Tex. Civ. App. 493.) is an instructive case. The fourth paragraph of the syllabus holds: "In an action for negligence of an employer in failing to provide rules whereby an employe was killed, plaintiff need not allege or prove exactly what rules should have been made."

Mr. Labatt in his work on *Master and Servant*, vol. 1 (ed. 1904,) sec. 228, in discussing the question of reasonableness, says: "Whether the reasonableness of a rule is a question for the court or the jury

781 is one as to which there is much apparent conflict between the authorities. One theory is that this question is always for the court, the reason assigned for this view being that it would otherwise be impossible to secure a uniformity of view, or to insure that a rule pronounced reasonable in one case by a jury might not be pronounced unreasonable by another jury in a subsequent case. Another view is that the question is primarily one for the jury. Some courts have enunciated an intermediate doctrine which seems to be more in harmony with general principles,—viz., that the reasonableness of a rule is a mixed question of law and fact, except in plain cases." The author cites numerous authorities in support of all three of the theories.

In *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. 87, it is held in the syllabus: "It is negligence on the part of railroad companies to fail to adopt such rules and regulations as are proper and necessary for the protection of the safety of its employees." The trial court charged the jury: "I say generally that the railway company has a right, and it is its duty, to make rules for the protection of the safety of its employees, and such rules its employees are bound to regard and obey. But under the form of making rules, of course, a railroad company cannot exempt itself from negligence. Its rules must be such as tend to the protection of the lives of its employees. With this general statement in regard to the rules, you may take and consider them." The jury found for the plaintiff and in an opinion by Brewer, J., the verdict was sustained and the motion for a new trial was overruled.

782 In *Merrill v. Oregon Short Line R. Co.*, 29 Utah, 264, 81 Pac. 85, the syllabus holds: "1. A master is under a primary and non-delegable duty to use ordinary care not only to promulgate, but also to enforce, reasonable rules and regulations for the safety of his servants, when the nature of the work requires it; and this duty is not performed merely by promulgating the rules, and using ordinary care in selecting men to enforce them. 2. The fact that the negligence of a fellow servant concurs with the negligence of the master in causing injury to a servant does not exempt the master from liability for his negligence." In the opinion (p. 279) it is said: "We think the evidence on behalf of respondents was quite sufficient to submit to the jury the question as to whether appellant used ordinary care, not so much, probably, in establishing and promulgating rules and regulations, but particularly in using ordinary care to enforce them. \* \* \* The truth and the weight of this testimony were for the jury, which, if believed by them, was sufficient to find that ordinary care had not been used by the appellant in either establishing or in enforcing rules and regulations for the safety of its servants."

In *Murphy v. Hughes*, 40 Atl. 187, (1 Pennewill (Del.) 250), it is held: "The question as to whether an employer has made proper rules for the government of his employes is for the jury." In the opinion it is said (p. 188): "It is, however, always a question for the jury to determine whether such rules are sufficient for the purpose."

783 In *Devoe v. New York C. & H. R. R. Co.*, 66 N. E. 568, (174 N. Y. 1) the first paragraph of the syllabus reads: "Car inspectors, employed at a station at which there were many tracks and switches upon which a large number of trains passed every day, were required to inspect each car of each train while it was at the station, at which time there was much switching and moving of cars. Several inspectors had been injured in the performance of such duties, and many complaints had been made as to the dangerous character of the work. There was but one printed rule on the subject, which had never been enforced. Held, in an action for the death of a car inspector killed by the backing up of a train against the train under which he was working, that it was for the jury whether a parol rule, claimed to have been made by the foreman of the car department, without instructions from any one, was in use, and was sufficient, and properly promulgated under the facts."

In *Lake Shore & M. S. R. Co. v. Murphy*, 50 Ohio St. 133, 33 N. E. 403, it is held: "It is the duty of a railway company to afford reasonable protection to its employees against dangers incident to their work. *Railway v. Lavalley*, 36 Ohio St. 221, approved and followed. And if, under the circumstances of this case, a rule providing for warning was necessary, and by the exercise of reasonable care on the part of the company, that necessity could have been foreseen, it was the duty of the company to prescribe such rule. Whether it ought to have so provided or not was a question for the jury."

784 In *Abel v. Delaware & Hudson Canal Co.*, 9 N. E. 325, (103 N. Y. 581), it is held: "In an action against a railroad company for damages for the death of an employee, a repair-man, which occurred while he was engaged in repairing defendant's cars standing upon a side track, which were run into by one of defendant's engines, it is for the jury to say whether or not defendant's rules providing for the safety of repair-men so employed are adequate for that purpose, and the court errs in ruling, as matter of law, that they are sufficient." In closing the opinion the court say (p. 326): "We do not perceive how it was possible to say, as matter of law, that the rules of the defendant were proper and sufficient for the protection of its repair-men, and that it should not have taken greater precautions, by rules or otherwise, for their safety. We think the facts should have been submitted to the jury, and that the nonsuit was improper." A judgment of reversal, therefore, followed.

In *Chicago, B. & Q. R. Co. v. McLallen*, Admr., 84 Ill. 109, the fourth paragraph of the syllabus holds: "A railway corporation has the lawful right to make reasonable rules for the conduct of its employees, and also for the conduct of passengers. Whether any given rule be reasonable, and therefore within the power of the corporation, or whether it be unreasonable, and therefore ultra vires, is a question of law for the court; but whether such rules are adequate for the safety of others, and the management of the trains, is a question of fact for the jury." In that case the decedent was

785 a conductor in charge of an extra train, commonly called a "wild train." Plaintiff recovered a verdict and judgment for \$4,500 which was affirmed. In the light of the authorities above cited, to which others might be added, defendant's second assignment must be decided adversely to it.

The third assignment is that the court erred in submitting to the jury subdivision *b* of instruction 1, viz: "In the failure to give said Wright timely warning by bell or whistle of the approach of said switch engine." The language above referred to was used by the court simply in stating the issues to the jury. Defendant has not called our attention to any other instruction where that language is used.

The fourth assignment is that the court erred in submitting to the jury the question whether defendant's employes upon the switch engine, as soon as they discovered the engine of plaintiff's intestate, jumped from their engine without reversing the same and without trying to stop. Counsel say this question should not have been submitted to the jury, for the reason that the undisputed testimony in this record of the witnesses introduced by both plaintiff and defendant is that at the very first moment the presence of 1486 was known the engineer applied all the apparatus on the engine to stop it, and actually did stop it in a very short distance. The trouble with this contention is that the undisputed evidence does not show, absolutely, that the engineer applied all the apparatus on the engine to stop it, but instead of showing that he actually did stop it, the evidence shows that it had not stopped when the collision 786 occurred. This question was properly submitted to the jury.

The fifth assignment is that the court erred in submitting to the jury the question as to whether defendant was guilty of negligence in running the switch engine around a curve at a negligent and dangerous rate of speed without having the same under control. What we have said under the first assignment disposes of this adversely to defendant.

The sixth assignment is that the court erred in giving instruction 10. This instruction has already been set out and disposed of under the second assignment.

The seventh assignment is that the court erred in giving instruction No. 13: "As to the defense of contributory negligence and also as to the defense of assumption of risks, the burden of proof is upon the defendant to establish both of said defenses by a preponderance of the evidence, as those terms have been hereinbefore defined." There was no error in this instruction. *Grimm v. Omaha E. L. and P. Co.*, 79 Neb. 395, 114 N. W. 769; *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459, 63 N. E. 541; *Arenschield v. Chicago, R. I. & P. R. Co.*, 128 Ia. 677, 105 N. W. 200; *Mace v. Boedker & Co.*, 127 Ia. 721, 104 N. W. 475.

The eighth assignment is that plaintiff's intestate was guilty of gross negligence. We spend no time in discussing this assignment as there is an entire absence of evidence to show any negligence on the part of plaintiff's intestate.

The ninth assignment is the legal sufficiency of the evidence for the court. In discussing this assignment counsel say that in the trial court counsel for plaintiff-  
787 relied on the Nebraska Employers' Liability Act, which modifies the defense of contributory negligence. What we have said in answer to the eighth assignment is a sufficient answer to this. There was no contributory negligence on the part of plaintiff's intestate. This also disposes of the tenth assignment.

The eleventh assignment is that the verdict was the result of passion and prejudice and is excessive. The evidence shows that the decedent was a man of good health, 32 years of age; that he was earning from \$125 to \$150 per month; that his expectancy, according to the Carlisle tables, would be 32 years. We cannot say that \$15,000 is an excessive  
788 judgment for the death of a man, under these circumstances.

The twelfth assignment is that the decedent assumed risk of collision with switch engines. We think counsel for plaintiff-  
789 answer this contention in plaintiffs' brief, where it is said: "Engineer Wright assumed the risks ordinarily incident to the business he was engaged in, but he did not assume any negligence of the defendant, and certainly did not assume the reckless conduct of the switch engine on this particular day."

The thirteenth assignment is that the court erred in submitting the case under the Employers' Liability Act. The contention under this assignment is that engine 1486 was on its way from Fairbury to

Council Bluffs, Iowa, and hence Wright "was engaged in interstate commerce." It is probably true that if Mr. Wright  
790 was engaged in interstate commerce at the time he was killed

the remedy would be under the federal act exclusively, but the trouble with this contention is, neither Mr. Wright nor engine 1486 was at the time engaged in interstate commerce. His order was to take this engine from Fairbury in Nebraska to Albright in Nebraska. He was running the engine without cars or train of any sort. The engine, so far as we can gather from the record, was defective and was on its way to the car shops for repairs. In *Chicago & N. W. R. Co. v. United States*, 168 Fed. 236, the circuit court of appeals for this circuit held: "The necessary movement of a defective empty car alone, for purpose of repair only, and not in connection with any cars commercially used, does not subject the carrier to the penalties of the acts." A similar holding was made by the same court in *United States v. Rio Grande W. R. Co.*, 174 Fed. 399. The same rule will of course apply to an engine.

We have given this case very careful consideration. We have examined the record with great care and are unable to find in it any prejudicial error. The judgment of the district court is therefore affirmed.

791 HAMER, J., dissenting:

1. Whether the defendant railway company formulated and promulgated any written or printed rule regulating the rate of speed that its switch engines might be run in the yards at Lincoln does not

present any question of negligence for the jury to consider unless in this particular case this part of the track run over was so run over by the switch engine at an unreasonable rate of speed, considering all the circumstances and especially that this part of the yards was in a cut in a curve of the road, and so might have imperiled the safety of plaintiff's decedent. As the jury were not so told and were not properly instructed touching the question, I am under the impression that there is prejudicial error in the proceeding and in the instructions given as also in the third paragraph of the syllabus of the majority opinion. Whether the railroad company did or did not lay down a rule for the guidance of its employes concerning the rate of speed at which the switch engine should be run in the yards is immaterial unless it is shown by the evidence that the switch engine was run too fast and had such an unreasonable rate of speed as to endanger the safety of the decedent. The third paragraph of the syllabus is objectionable.

2. It must be all a matter of speculation, in the absence of any rule, that if a reasonable rule had been made by the railroad company touching the running of the switch engine in its yards it would have controlled or even influenced the conduct of the crew in running such switch engine. For this reason the theory of  
790 the opinion seems to be wrong.

3. By instruction No. 8 the court instructed the jury: "Touching subdivision (a) of the first paragraph of these instructions, you are further instructed that it was the duty of the defendant company to exercise reasonable care to adopt and promulgate reasonable rules for the control and conduct of its business in all cases, in case its business had become sufficiently extensive to demand their adoption in the exercise of reasonable care for the protection of its employees. In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards were reasonably sufficient for the protection of its employes at the time plaintiff's intestate sustained his injuries." The effect of this instruction would seem to be to turn the jury loose in the field of speculation as to whether the railroad company might not have improved its rules touching the protection of its employees, and if for any reason it had not done so that it is liable in this case. The trouble with this sort of thing is that the attention of the jury is not called to any specific thing which may have contributed to the death of plaintiff's decedent.

It is well said in the majority opinion that "a rule that a switch engine may run through the yards, on the main line, not under control but at a high rate of speed, when its crew all know that there is an 'extra' on the main line passing through the yards  
791 would be a barbarous rule; and if the rules of a railway company permit such a practice, it should be held liable for injuries to employes on the 'extra' who are injured while such extra is being operated in compliance with the rules of the company, viz.: under full control. If the unreasonableness of a rule is for the court and not for the jury, the court should in such a case instruct the

jury that such a rule is unreasonable." I apprehend that the railway company may make no rule which would relieve the crew of the switching engine from exercising ordinary care and common prudence to avoid a collision, but the language used in the instruction quoted is of a most general character. That turns over to the jury the question of determining whether a better set of rules might not have been constructed, and if so then the inference is that it is the duty of the jury to find that the defendant is liable. I do not think that this can be the law. If the jury is turned loose and told that it may occupy as wide a province as it likes it will be almost sure to find that other and better rules might have been made. When it is remembered that jurors are not specially instructed along the line of operating railways and formulating rules for their management it must be seen that the instruction is an invitation to pursue any theory which may present itself to the imaginative mind of the juror.

The first case cited in the majority opinion is that of an inferior court. The Texas case cited does not seem to be clearly in  
792 point. The other cases cited do not seem as broad as the instruction in the instant case.

4. Instruction No. 9 requested by the defendant reads: "You are further instructed that the defendant was not required to insure its locomotive engineers from collisions with switch engines or other like accidents resulting from the management of trains; that defendant's duty to the employes was only to use reasonable care and diligence in the management and operation of its switch engines, and unless you find that the defendant, or its agents and employes, failed to use reasonable care and diligence in the management of its switch engine, and as a consequence thereof plaintiff's intestate was injured, you cannot find for plaintiffs." I think the above instruction requested by the defendant should have been given.

It was according to the theory of the defendant's case that the plaintiff's intestate was running his engine at a rate of speed so great as not to be under full control and that this was the proximate cause of the injury.

Touching this matter the defendant requested the giving of an instruction as follows: "Instruction No. 13. You are instructed that the company has promulgated and published rules governing the operation of locomotive engines and trains in the Lincoln yards; and that under said rules, Otto O. Wright was bound to run his engine through the Lincoln yards under full control. You are instructed that an employe, if within his power so to do, is bound to  
793 obey all of the reasonable rules and instructions of his employer with reference to the conduct of his business, and if you find from the evidence that at or immediately before the accident, when the engines first came in sight of each other, the said Otto O. Wright was running his engine at a rate of speed so as not to be under full control and that this was the proximate cause of the injury, then you are instructed that plaintiffs cannot recover." I think it should have been given. For the foregoing reasons I dissent from the majority opinion.

794 And afterwards, to-wit, on the 31st day of October, 1913 there was filed in the office of the clerk of said supreme court, for rehearing a certain Motion, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

Gen. No. 17189.

LIZZIE L. WRIGHT and HENRY C. WRIGHT, Administrator of the Estate of Otto Wright, Deceased, Appellees,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Appeal from Lancaster County.

*Motion for Rehearing.*

Comes Now the Chicago, Rock Island & Pacific Railway Company and moves the court to grant a rehearing in the above entitled case for the following good and sufficient reasons, to-wit:

I.

The decision of the court is absolutely contrary to the evidence in the case.

II.

The decision is contrary to law.

III.

The court in the opinion bases its conclusion on mistaken and erroneous statements of what the evidence discloses.

IV.

The finding of fact of the court that the accident occurred 100 feet north of the viaduct is wrong, and is contrary to all the evidence in the record.

V.

795 The finding in the opinion that the switch engine was exceeding five miles an hour is erroneous and wrong and not supported by any evidence in the case. All the undisputed evidence of both the plaintiff- and defendant placing the speed of the switch engine from three to five miles an hour when the two engines first appeared in sight of each other.

VI.

The finding and the holding of this court that the deceased, Otto Wright, was not guilty of any contributory negligence is absolutely

contrary to the evidence and the evidence disclosing that five miles per hour is the maximum rate of speed at which an engine can be run around the cut and curve at the place of the accident and be under full control, and the evidence disclosing that Mr. Wright was running ten miles an hour.

#### VII.

The court erred in finding and holding that Mr. Wright was running from Fairbury to Albright instead of from Fairbury to Council Bluffs, the last named being a division, and the undisputed evidence in the record being that Mr. Wright was taking his engine from Fairbury to Council Bluffs.

#### IX.

The court erred in holding and in finding that Mr. Wright was not engaged in interstate commerce.

#### X.

The court erred in holding as a matter of law that the rules of this appellant company were insufficient, and in holding that no error existed in submitting their sufficiency to the jury, for the reason that because of the submission to the jury of the sufficiency of the company's rules in the Lincoln yards, gross error existed in the record, and this court erred in not reversing this case.

#### XI.

This court erred in not finding and holding from the evidence that Mr. Wright was guilty of contributory negligence more than 796 slight, and in not reversing said case on account thereof.

#### XII.

For the reason that the lower court erred in submitting subdivision "b" of instruction No. 1 to the jury, which was error because of which this court should have reversed the case.

#### XIII.

This court erred in holding and finding that there was any evidence to submit to the jury whether defendant's employees upon the switch engine jumped from their engine without reversing the same and without trying to stop the same, for the reason that the undisputed evidence was that said engine was reversed and the emergency put in before appellant's employees jumped.

#### XIV.

The court erred in finding that there was sufficient evidence to be submitted to the jury upon the question of the appellant's negligence in running said switch engine around said curve at a negligent and dangerous rate of speed without having the same under control.

## XV.

The giving of instruction No. 13 by the lower court was error and this court erred in not so holding and in holding that there was no contributory negligence to warrant the giving of this instruction.

## XVI.

This court erred in not holding that Mr. Wright assumed the risk of operating engines under the rules established by the company.

## XVII.

This court erred in not holding that said verdict was the result of passion and prejudice and in not holding the same to be excessive and in not reversing said case because thereof.

CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY CO.,

By HOLMES & DE LACY, *Attorneys.*

797      Endorsed: General Number 17189. In the Supreme Court of Nebraska. Lizzie L. Wright and Henry C. Wright, Administrator of the estate of Otto Wright, Deceased, Appellees, vs. The Chicago, Rock Island & Pacific Railway Company, a Corporation, Defendant and Appellant. Appeal from Lancaster County. Motion for Rehearing. G. W. Berge, Attorney for Appellee. Holmes & De Lacy, Attorneys for Appellant. Supreme Court of Nebraska. Filed Oct. 31, 1913. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 19th day of December, 1913, there was filed in the office of the clerk of said supreme Court, a certain Motion, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

LIZZIE L. WRIGHT and HENRY C. WRIGHT, Administrator of the Estate of Otto Wright, Deceased, Appellees,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

*Motion.*

Comes now the Chicago, Rock Island & Pacific Railway Company, appellant in the above entitled cause, and asks leave of the Court to file an additional typewritten brief in support of its motion for a rehearing.

CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY CO.,

By HOLMES AND DE LACY, *Its Attorneys.*

Endorsed: 17189. Wright v. C., R. I. & P. R. Co. Motion of appellant for leave to file additional typewritten brief on motion for rehearing. Supreme Court of Nebraska. Filed Dec. 19, 1913. H. C. Lindsay, Clerk.

798 And afterwards, to-wit, on the 30th day of January, 1914, there was rendered by said supreme court, and entered of record upon the Journal thereof, a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Jan. 30.

No. 17189.

LIZZIE L. WRIGHT et al., Appellee,  
v.  
CHICAGO, R. I. & P. R. Co., Appellant.

Appeal from the District Court of Lancaster County.

It is by the court ordered that oral argument on the motion of appellant for rehearing herein be had at the session of court commencing March 2, 1914.

M. B. REESE,  
*Chief Justice.*

And afterwards, to-wit, on the 2nd day of March, 1914, the following among other was had and done in said supreme court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, M'ch 2.

The following causes were argued by counsel and submitted to the court:

No. 17189.

WRIGHT  
v.  
CHICAGO, R. I. & P. R. Co.

(On Motion for Rehearing.)

Appeal from Lancaster County.

\* \* \* \* \*

799

M. B. REESE,  
*Chief Justice.*

And afterwards, to-wit, on the 18th day of April, 1914, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 18.

No. 17189.

LIZZIE L. WRIGHT et al., Appellees,  
v.  
CHICAGO, R. I. & P. R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon motion of appellant for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find no probable error in the judgment of this court heretofore entered herein; it is, therefore, ordered and adjudged that said motion for rehearing be, and the same hereby is, overruled, and a rehearing herein denied.

Opinion, Per Curiam. Hamer, J., dissenting.

M. B. REESE,  
Chief Justice.

And on the same day, there was filed in the office of the clerk of said supreme court, a certain Opinion, in the words and figures following, to-wit:

800

No. 17189.

WRIGHT  
v.  
CHICAGO, R. I. & P. R. Co.

*Opinion. Filed April 18, 1914.*

No Syllabus.

801 Per CURIAM:

After the reargument in this case we have carefully reexamined the record and are satisfied with the following language in the former opinion, — Neb. —, for the reasons there given—"A rule that a switch-engine may run through the yards on the main line not under control but at a high rate of speed, when its crew all know that there is an 'extra' on the main line passing through the yards, would be a barbarous rule; and, if the rules of a railway company permit such a practice, it should be held liable for injuries to employees on the extra who are injured while such extra is being operated in compliance with the rules of the company, viz., under full control. If the reasonableness of a rule is for the court and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable. Submitting the question to the jury in such a case could not, therefore, prejudice defendant." The decedent was running his engine under full control, within the meaning of the rule

of the company. There was no express rule as to the speed allowed to the switch-engine. Of course the law requires that such engine should not be run at an unreasonable rate of speed under the circumstances. The engineer of the switch-engine must have had a clear view of the approaching engine for at least 420 feet, and it was run at least 370 feet of this distance before the collision occurred. It could have been stopped within a distance of 60 feet unless running at a greater speed than 20 miles an hour, and, knowing, as the crew of the switch-engine did, that No. 1468 was in the yards, to run at a greater speed than 20 miles an hour in such a locality and under such circumstances was in itself negligence. In such a case the court might properly have told the jury that any rule of the company which permitted such action was unreasonable, and the giving of an erroneous instruction as to the reasonableness of the rules would be without prejudice to the defendant. There is however no doubt that the instruction given by the court was erroneous. The jury was told: "In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch-engines in the Lincoln yards, were reasonably sufficient for the protection of its employees, at the time plaintiff's intestate sustained his injuries," thus submitting to the jury to determine the reasonableness of the rules of the company as a whole so far as they were or were not sufficient to protect the employees. Different juries might not take the same view of a system of rules for the running of trains and engines in a complicated railroad yard, and it is beyond their power to determine what those rules should be. When the question of negligence depends upon the reasonable sufficiency of a certain rule the court should determine the question, if the facts are not in dispute. If the facts upon which the reasonableness of the rule depends are in substantial conflict the court should tell the jury plainly under what conditions the rule would be reasonable and allow the jury to determine the facts. In such case the reasonableness of the particular rule becomes a mixed question of law and fact, the law to be determined by the court and the fact by the jury. To this extent our former opinion is modified, and, as there is no prejudicial error in the verdict for the reasons stated above, and in our former opinion, the motion for rehearing is overruled and our former judgment adhered to.

804 **HAMER, J., dissenting:**

I feel that I am in duty bound to dissent from the majority opinion. We cannot too zealously protect the rights of litigants. As I look upon it the errors of the trial court which contributed to the bringing about of the verdict and the judgment are most manifest. The majority opinion, — Neb. —, concedes the following instruction to be wrong but undertakes to say that it worked no injury to the defendant. It is claimed that it was not prejudicial. The jury was told by it, "In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with

respect to the operation and control of its engines and trains, including its switch-engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries." It is argued that the foregoing was erroneous and it is said that the reasonableness of the rules of the company as a whole should be determined by the court and not by the jury, and it is claimed that for this reason the instruction could have done no harm. To this I say that if the particular instruction conduced to the bringing about of a wrong verdict and a wrong judgment then that this court should undo what the lower court did. That is the beginning and the end of it. By the instruction quoted the jury were turned loose to determine whether the railroad company should not have made better rules for the protection of its employees. Of course in such a case the jury have not been instructed along the lines of conducting a railway. They had no special instruction on the subject. Neither are they lawyers. They are wholly disqualified from the standpoint of practical mechanics and legal knowledge. But turned loose with the invitation to range at large in the field of speculation in determining whether the rules adopted might not have contributed to bringing about the result they would be sure to condemn the railway company. When they condemned the railway company they did it by the rendition of a verdict which was reached because of the error of the trial court. It is said in the majority opinion that if the facts upon which the reasonableness of the rule depends are in substantial conflict then that the court should tell the jury under what conditions the rule would be reasonable and then allow the jury to determine the facts. It is further said that the reasonableness of the particular rule becomes a mixed question of law and fact, the law to be determined by the court and the facts by the jury, and that to this extent the former opinion of this court is modified. But that reasoning has nothing to do with the question as to whether the instruction conduced to the bringing about of this verdict. It perhaps determines something for the future, but it determines nothing in the present. The instruction of the lower court sent the jury on a wild goose chase after the construction of rules for the protection of employees when it should have directed their attention to the practical question of whether the switch engine was run too fast. If that switch-engine was run too fast and thereby caused the death of the plaintiff's decedent the railway company is to be blamed for its negligence. The jury were not told that. Instead they were told "to look about and find something." Of course they found it. Whatever the rule it would not justify the railway company in running its switch-engine too fast. It could make no rule to justify that and the actual thing to be considered by the jury was whether the switch-engine did or did not run too fast and whether because of that fact it did not bring about the collision and occasion the death of the deceased. The railway company could make no rule which would relieve the crew of the switch-engine from exercising ordinary care to avoid a collision.

2. The defendant requested the giving of instruction No. 13.

As requested it contained the following: "and if you find from the evidence that at or immediately before the accident, when the engines first came in sight of each other, the said Otto O. Wright was running his engine at a rate of speed so as not to be under full control, and that this was the proximate cause of the injury, then you are instructed that plaintiffs cannot recover." This involved the idea that if the decedent was himself negligent and by his negligence contributed to his death that the plaintiffs may not recover. This ought to be the law. I believe it to be the law and that the trial court should have observed it, and should have properly instructed the jury on that question.

3. A careful reading of the evidence may justify the conclusion that the deceased was not running his engine at an excessive rate of speed immediately before the accident occurred, but such examination as I have given to the testimony quoted in the briefs has created the impression in my mind that he was running his engine at the rate of ten miles an hour, or thereabouts, and that rate seems too fast to run in a cut over a curve where the view was obstructed as it was in this case. I think that the deceased was negligent in maintaining a greater rate of speed than the conditions permitted and that he thereby contributed to the causes which produced his death. It is not enough that the case was submitted to a jury. There should be evidence sufficient to bear examination by an impartial, intelligent and discriminating mind, which should find therein facts and reason sufficient to sustain the verdict. If the deceased by his conduct brought about the danger which caused his destruction, the railway company ought not to be compelled to pay.

4. But whatever may be the finding concerning the rate of speed it is apparent from an examination of the testimony of the witnesses that the deceased disregarded the rule which required him to run his engine "under full control." John Bell, a locomotive engineer, for 13 years, had run from Fairbury to Council Bluffs. He testified: "Q. In passing around and over that curve, Mr. Bell, what is the highest amount of speed that could be obtained and be under control?" He answered, "Not over five miles an hour." Engineer

Hall testified: "The maximum speed at which an engine could run around and through that curve at Holdrege street, being under full control, would not be over four or five miles an hour at any point in that curve." W. B. Oakford, the road-foreman of equipment, who had had 18 or 19 years of experience as an engineer, testified: "The man who is supposed to run 'under full control' would have to go in that cut and around that curve at the rate of from three to five miles an hour." He is positive that the rate of speed should not exceed five miles an hour in any event. B. J. Shamp testified: "I should not think a person would be absolutely under full control going over five miles an hour, because you cannot see far enough around that cut to be able to stop, to be going at a greater speed." J. J. Breheny testified that he was familiar with the term "under full control;" that the maximum rate of speed "in running around this curve" in order to keep within that definition and in order to keep within control should not exceed five miles per

hour, the distance you can see any obstruction on the track to be clear "is not a great deal and I would want to stop very quickly." J. E. Odey, a locomotive engineer, for 25 years and who was familiar with the place testified that he was familiar with the term "under full control" and that "running under full control through the cut and around the curve at Holdredge street would be from three to five miles an hour going east." John T. McLean testified that to exceed five miles an hour around this Holdredge street cut and curve would not be going "under full control."

809 The engineer who was killed apparently took his life in his hands when he went in that cut so fast that he would be unable to stop within the distance that he could see. He was not, according to the testimony of these witnesses, going "under full control." If he went to his death because of his fearless recklessness the railway company ought not to pay.

5. The deceased operated an "extra." It was an inferior train expected to run "under full control." It was to find the main track occupied. It was to be able to stop within the distance that the vision of the engineer showed the track to be clear. That is what is meant by "under full control." The trial court submitted to the jury whether the company's rules with respect to the operation and control of its engines and trains, including its switch-engines in the Lincoln yards, were reasonably sufficient for the protection of its employees. The question was not tried like any other issue of fact. The rules being proved the plaintiff proceeded to contend that they were insufficient and the judge licensed the jury to go out on an exploring expedition of its own. The jury were permitted to come to any conclusion they liked and without any direction of any kind by the court. The contention in the majority opinion that the position of the trial court was sound is said to be supported by *Southern R. Co. v. Craig*, 113 Fed. 76. If I understand that case it did not submit to the jury whether the rules of the defendant company were sufficient. The case simply holds that it was for the jury to say

810 ing a collision with the incoming train. It may be said that it would always be the duty of the engineer of the switch-engine or any other engine to exercise ordinary care to avoid a collision. I have made an examination of some of the other cases cited in the majority opinion. I am unable to agree with my associates.

6. In the original majority opinion there is the following: "Q. Have you any rule applying to switch-engines about running under control? A. No sir. It will be seen, therefore, that in the defendant's yard the switch-engine was a free-lance as against all except first-class trains." The opinion emphasizes the fact that under the rules the switch-engine did not have to run "under full control" while the engine attached to the train was required to do so. The opinion seems to regard this as restrictive and irksome. It is further said in the original majority opinion, "If the reasonableness of a rule is for the court, and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable. Sub-

mitting the question to the jury in such a case could not, therefore, prejudice defendant." The contention is that neglect of the court to discharge its duty and at the same time violating and neglecting a duty that is incumbent upon it, and requesting the jury to do something it has no authority to do, is without prejudice. The contention is to the effect that a wrong conception of its duty by the court and a wrong exercise of that duty hurts nobody. The original majority opinion seems to the writer to be clearly wrong in that contention. It is to the effect that the court may be blind and the jury may be blind and yet nobody is hurt because no one can see the wrongful thing that is done.

811 And afterwards, to-wit, on the 20th day of April, 1914, there was filed in the office of the clerk of said supreme court, a certain Motion in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

LIZZIE L. WRIGHT et al., Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

*Motion to Withhold Mandate.*

Comes now the Chicago, Rock Island & Pacific Railway Company, appellant, and moves and requests the court to withhold the sending of the mandate in the above entitled case to the district court of Lancaster County, for a period of ten days from this date in order to allow the appellant, the Chicago, Rock Island & Pacific Railway Company, time in which to prepare a petition for a writ of error to the Supreme Court of the United States.

CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY COMPANY,  
By HOLMES & DE LACY, *Its Attorneys.*

Allowed Apr. 20, 1914.

M. B. REESE,

*Chief Justice.*

Endorsed: 17189. In the Supreme Court of the State of Nebraska. Lizzie L. Wright et al., Plaintiff, vs. Chicago, Rock Island & Pacific Railway Company, Defendant. Motion to withhold Mandate. Supreme Court of Nebraska. Filed Apr. 20, 1914. H. C. Lindsay, Clerk. Holmes & De Lacy, Attorneys for Defendant.

812 And on the same day, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Apr. 20.

No. 17189.

LIZZIE L. WRIGHT et al., Appellees,  
v.  
CHICAGO, R. I. & P. R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon motion of appellant for an order directing the clerk of this court to withhold the issuance of a mandate, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and the same hereby is, sustained, and the clerk directed to withhold the issuance of a mandate for ten days from this date for the purpose of allowing appellant to make application for writ of error.

M. B. REESE,  
*Chief Justice.*

And afterwards, to-wit, on the 28th day of April, 1914, there was filed in the office of the clerk of said supreme court, a certain Petition for Writ of Error, which original Petition, with allowance thereof by the Chief Justice of said supreme court, endorsed thereon, is hereto attached and marked Exhibit "A."

813

EXHIBIT "A."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of the State of Nebraska.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the  
Estate of Otto O. Wright, Deceased, Plaintiffs and Appellees,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant and Appellant.

*Petition for Writ of Error.*

Comes now the above named Chicago, Rock Island & Pacific Railway Company, appellant, and says that on the 26th day of September, 1913, judgment in this case was entered by this court against the said Chicago, Rock Island & Pacific Railway Company, appellant, affirming a judgment of the district court of Lancaster County, Nebraska, and that thereafter a motion for a re-hearing was filed, presented, considered, and on the 18th day of April, 1914, denied by this court, whereupon said judgment became final; that the said supreme court of the State of Nebraska is the highest court of said state in which a decision in this case could be had.

That the said Chicago, Rock Island & Pacific Railway Company was and is aggrieved in that in said judgment and proceedings had prior thereto in this case certain errors were committed to its prejudice. That in the said action, rights, privileges and immunities were claimed by your petitioner under the constitution and statutes of the United States, and under authority exercised under the United States, and the decision of the said supreme court of the State of Nebraska was against the rights, privileges and immunities especially set up and claimed under said constitution, statutes and authority, all of which will more fully appear in detail upon the assignments of errors filed herein.

Your petitioner further alleges and says that the judgment of the district court of Lancaster County, Nebraska, which has been affirmed and made final by the judgment of this court heretofore mentioned was against this appellant for the sum of Fifteen Thousand Dollars (\$15,000.00), and that said judgment of the district court of Lancaster County, Nebraska, was entered on the 22<sup>nd</sup> day of March, 1911.

Wherefore, the said Chicago, Rock Island & Pacific Railway Company prays that a writ of error may issue to the supreme court of the State of Nebraska for the correcting of the errors complained of and that a duly authenticated transcript of the record, proceedings, and papers herein may be sent to the United States Supreme Court.

And the said Chicago, Rock Island & Pacific Railway Company further prays for an order fixing the amount of bond for a supersedeas in said cause, and that upon the giving of said bond all further proceedings in this court and in the district court of Lancaster County, Nebraska, may be suspended and stayed until the determination of said writ or error by the United States Supreme Court.

PAUL E. WALKER,  
E. P. HOLMES &  
G. L. DE LACY,

*Attorneys for the Chicago, Rock Island &  
Pacific Railway Company.*

STATE OF NEBRASKA,  
Lancaster County, ss:

E. P. Holmes being first duly sworn, upon his oath deposes and says that he is one of the attorneys for the Chicago, Rock Island & Pacific Railway Company, that he has read the foregoing petition and that the facts set forth therein are true.

E. P. HOLMES.

Subscribed in my presence and sworn to before me this 28th day of April, 1914.

[Notarial Seal of Emma Hahlbeck, Lancaster County, Nebraska.  
Commission expires Nov. 13, 1918.]

EMMA HAHLBECK,  
Notary Public.

[Endorsed:] Supreme Court of Nebraska. Filed Apr. 28, 1914. H. C. Lindsay, Clerk.

815 [Endorsed:] In the Supreme Court of the State of Nebraska. Lizzie L. Wright et al., Plaintiff- and Appellees, vs. Chicago, Rock Island & Pacific Railway Company, Defendant and Appellant. Petition for Writ of Error. Supreme Court of Nebraska. Filed Apr. 28, 1914. H. C. Lindsay, Clerk. Paul E. Walker, Holmes & De Lacy, Att'ys for Def't.

816 And on the same day, there was filed in the office of the clerk of said court, certain Assignments of Error, which original Assignments of Error is hereto attached, and marked Exhibit "B."

817 EXHIBIT "B."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of the State of Nebraska.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the Estate of Otto O. Wright, Deceased, Plaintiff- and Appellee-  
vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant and Appellant.

*Assignment of Errors.*

The appellant in the above entitled case, the Chicago, Rock Island & Pacific Railway Company, in connection with its petition for a writ of error herein presents and files therewith its assignment of errors as to which matters and things it says that the decision and final judgment of the supreme court of the State of Nebraska entered herein on the 26th day of September, 1913, a motion for re-hearing on the same being overruled on the 18th day of April, 1914, is erroneous, and avers and shows that in the record and proceedings in said cause, the supreme court of the State of Nebraska erred to the grievous injury and wrong of the said Chicago, Rock Island & Pacific Railway Company and to the prejudice and against the rights of the said Chicago, Rock Island & Pacific Railway Company, appellant and plaintiff in error in the following particulars, to wit:

1.

The said supreme court erred in holding that under the evidence and pleadings in the case that the Chicago, Rock Island & Pacific Railway Company was not entitled to have this case tried and submitted to the jury under the Federal Employers' Liability Act, being an act approved April 22, 1908, ch. 149, 35 Stat. L. 65.

## 2.

The said supreme court erred in holding that at the time of the collision, in which the deceased Otto O. Wright, was killed, for the death of whom this action was brought, the said Otto O. Wright was not employed or engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, being an act approved April 22, 1908, Ch. 149, 35 Stat. L. 65.

## 3.

The supreme court erred in holding that under the evidence in this case the said Otto O. Wright was not engaged and employed by the said Chicago, Rock Island & Pacific Railway Company in interstate commerce at the time of the collision which resulted in his death, within the meaning of the said act above mentioned.

## 4.

The supreme court erred in not reversing the judgment of the trial court for the reason that the said trial court erred in trying and submitting the case under the Employers' Liability Act of the State of Nebraska, being an act in effect July 5, 1907, page 192 Laws of Nebraska, 1907, Section 10592 of Cobbe's Annotated Statutes, and Section 2803, Compiled Statutes of Nebraska for 1907, and in refusing to try and submit said case under an Act of Congress of April 22, 1908, 35 Stat. L. 65.

## 5.

The said Supreme Court erred in not reversing the judgment of the trial court for the reason that the said trial court erred in not sustaining the motions of the defendant to direct a verdict made at the close of the plaintiff's testimony and at the conclusion of the taking of testimony upon the following grounds, "1. That the evidence of the plaintiff is insufficient upon which to base a verdict against the defendant. 9. For the further reason that from the evidence of the plaintiff as a matter of law, plaintiff's action will not lie against the defendant company."

## 6.

The supreme court erred in not holding that the death of Otto Wright, for whose death this action is brought, was not caused or was not the result in whole or in part of any act or of any negligence of any of the officers, agents or employees of the plaintiff in error, and was not the result of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment, and hence no recovery could be had under the Act of Congress of April 22, 1908, 35 Stat. L. 65.

## 7.

The supreme court erred in not holding that under the evidence in the case the death of the said Otto O. Wright was the direct and

proximate result of his own contributory negligence, and was not the result of any act of this plaintiff in error, and hence under Section Three of the act of April 22, 1908, no damages could be recovered, and no judgment should be sustained awarding damages against this plaintiff in error.

## 8.

The supreme court erred in not sustaining Error No. 50 of the assignment of errors contained in the brief of the plaintiff in error, filed in this court in the above entitled case, the same being on page 7 of the said original brief, which is as follows:

"The court erred in submitting the cause to the jury upon the theory that a recovery was permissible under the Nebraska Employers' Liability Act, when the evidence disclosed that the decedent was running from Fairbury, in Nebraska, to Council Bluffs, in Iowa, and was engaged in interstate commerce at the time of his injury and the said cause should have been tried under the Federal Employers' Liability Act."

## 8.

The supreme court erred in sustaining the judgment of the trial court and in entering judgment against the appellant, the Chicago, Rock Island & Pacific Railway Company.

## 9.

The supreme court erred in not reversing the judgment of the lower court for the reason that the lower court erred in submitting the question as to whether or not the rules promulgated and enforced by this plaintiff in error were reasonably sufficient for the reason that under the Acts of Congress of April 22, 1908, 35 Stat., 65, no recovery could be had based on said alleged grounds of negligence.

## 10.

The supreme court erred in holding that a lone engine running from Fairbury, Nebraska, to Council Bluffs, Iowa, on the lines of this plaintiff in error, the engineer running under orders from Fairbury to Albright, Nebraska, was not engaged in interstate commerce so as to necessitate the trying of said case under an act of Congress of April 22, 1908, 35 Stat. L. 65.

## 11.

The supreme court erred in sustaining the judgment of the trial court for the reason that under the evidence in this case no acts of negligence was shown on the part of this plaintiff in error or its agents and employees, or officers, such as would entitle a recovery under the act of April 22, 1908, 35 Stat. L. 65.

## 12.

The supreme court erred in affirming the judgment of the trial court and in entering judgment against this appellant under the

Nebraska Employers' Liability Act, for the reason that the said act was superseded by an act of Congress of April 22, 1908, 35 Stat. L. 65, and that said judgment amounts to the taking of property without due process of law in violation of Section One, Article Fourteen of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, the said Chicago, Rock Island & Pacific Railway Company, plaintiff in error, prays that the said decision and final judgment of the supreme court of the State of Nebraska may be reversed and set aside and held for naught, and that judgment may be rendered for plaintiff in error, granting it its rights under the statutes and laws of the United States, and plaintiff in error also prays judgment for its costs.

PAUL E. WALKER,  
HOLMES & DE LACY,

*Attorneys for Appellant, The Chicago,  
Rock Island & Pacific Railway Com-  
pany, a Corporation.*

821 [Endorsed:] 17189. In the Supreme Court of the State of Nebraska. Lizzie L. Wright, et al., Plaintiff and Appellee, vs. The Chicago, Rock Island & Pacific Railway Company, a corporation, Defendant and Appellant. Assignment of Errors. Supreme Court of Nebraska. Filed Apr. 28 1914. H. C. Lindsay, Clerk. Paul E. Walker, Holmes & De Lacy, Attorneys for Appellant.

822 And on the same day, there was filed in the office of the clerk of said supreme court, a certain Order allowing Writ, which said Order was entered of record upon the journal thereof, and is in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 28.

No. 17189.

LIZZIE L. WRIGHT et al., Appellees,

v.

CHICAGO, R. I. & P. R. Co., Appellant.

Appeal from the District Court of Lancaster County.

Comes now the Chicago, Rock Island & Pacific Railway Company, the appellant above named on this 28 day of April, A. D. 1914 and files and presents to this court its petition praying for the allowance of a writ of error intended to be urged for it, and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered, may be sent to the supreme court of the United States, and praying that an order be made fixing the amount of security or bond which the appellant should give and furnish upon said writ of error, and that

upon the giving of said bond all further proceedings of this court and of the district court of Lancaster county, Nebraska, be suspended and stayed until the determination of said writ of error by the said supreme court of the United States, and praying that such other and further proceedings may be had in the premises as may be just and proper; and it appearing that the Chicago, Rock Island & Pacific Railway Company has filed its assignment of errors, upon consideration of the said petition and of the assignment of errors heretofore filed, this court desiring to give petitioner an opportunity to test in the supreme court of the United States the questions therein presented, it is ordered by this court that a writ of error be allowed as prayed, and it is further ordered that upon said appellant, the Chicago, Rock Island & Pacific Railway Company, filing with the clerk of this court a good and sufficient bond in the sum of \$25,000, 823 conditioned according to law, and conditioned that if the said Chicago, Rock Island & Pacific Railway Company shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the said obligation to be null and void, else to remain in full force and virtue, and that all proceedings in this court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States Supreme Court, said bond to act as a supersedeas.

In testimony whereof, my hand this 28 day of April, A. D. 1914.

M. B. REESE,

*Chief Justice of the Supreme Court  
of the State of Nebraska.*

And on the same day, a certain Citation was issued by the said Supreme Court of Nebraska, by the Chief Justice thereof and on the 1st day of May thereafter, the said Citation so issued was duly returned, with service thereof acknowledged thereon, and same was filed in the office of the Clerk of said Supreme Court of Nebraska, the said original Citation with Acknowledgment of service thereof, is hereto attached, and marked Exhibit "C."

824

#### EXHIBIT "C."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

UNITED STATES OF AMERICA, ss:

The President of the United States to the said Lizzie L. Wright, of Denver, Colorado, and to Henry C. Berge, of Lincoln, Nebraska, Administrators of the Estate of Otto O. Wright, Deceased, Greeting:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Nebraska, wherein the Chicago, Rock Island & Pacific Railway Company, a corporation, is plaintiff in error and you

are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in this behalf.

Witness the Chief Justice of the Supreme Court of the State of Nebraska, this 28 day of April, A. D. 1914.

M. B. REESE,  
*Chief Justice of the Supreme Court  
of the State of Nebraska.*

Attest:

H. C. LINDSAY,  
*Clerk of the Supreme Court  
of the State of Nebraska.*

CITY OF LINCOLN,  
*County of Lancaster, State of Nebraska:*

April —, 1914.

I, the undersigned attorney of record for the defendants in error of the above entitled cause hereby acknowledge due service of the above citation and enter an appearance for said defendants in error in the Supreme Court of the United States.

*Attorney for Lizzie L. Wright and  
Henry C. Berge, Administrators of  
the Estate of Otto Wright, De-  
ceased.*

[Endorsed:] #702. 17189. Wright v. C., R. I. & P. R. Co.  
Citation & proof of service. Supreme Court of Nebraska. Filed  
May 1 1914. H. C. Lindsay, Clerk.

*Marshal's Costs.*

Service .....	\$2.00
Mileage .....	....
Expense .....	....
Total .....	\$2.00

Rec'd at Marshal's office Apr. 30 1914. Handed Deputy Apr. 29 1914.

825 DISTRICT OF NEBRASKA, ss:

I hereby certify and return, that on the 29th day of April, 1914, I received this citation, and on the 29th day of April 1914, I served the same upon Geo. W. Berge, Attorney for the within named Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto Wright deceased, at Lincoln, in Lancaster County, State, and District

of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

WM. P. WARNER,  
*United States Marshal for the District of Nebraska,*  
By CLAUDE P. HENSEL, *Deputy.*

Supreme Court of Nebraska. Filed May 1 1914. H. C. Lindsay, Clerk.

826 And on the 28th day of April, 1914, there was filed in the office of the clerk of said supreme court, a certain Writ of Error with allowance thereof by the Chief Justice of said supreme court which original Writ of Error with allowance thereof is attached hereto marked Exhibit "D."

827 EXHIBIT "D."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska, before you, on the 26th day of September, 1913, of the September term of the year 1913 thereof, being the highest court of law or equity of said state in which a decision could be had in said suit between the Chicago, Rock Island & Pacific Railway Company, a corporation, defendant and appellant, and Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, deceased, plaintiff and appellees, wherein rights, privileges and immunities are claimed under the constitution and statutes of the United States and under authority exercised under the United States, and the decision was against the rights, privileges and immunities especially set up and claimed under such constitution, statutes and authority, a manifest error has happened to the great damage of the said Chicago, Rock Island & Pacific Railway Company, a corporation, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given that then under your seal, distinctly and openly, you send the records and proceedings as aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, or of right, and according to the laws and constitution of the United States should be done.

828 Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 28 day of April, A. D. 1914.

Done in the city of Lincoln, and County of Lancaster, with the seal of the District Court of the United States for the District of Nebraska, Lincoln Division, attached.

[Seal United States District Court, District of Nebraska,  
Lincoln Division.]

R. C. HUGH, *Clerk*,  
By J. H. McCLAY,  
*Deputy Clerk of the District Court of  
United States for the District of  
Nebraska, Lincoln Division.*

Allowed by  
MANOAH B. REESE,  
*Chief Justice of the State of Nebraska.*

[Endorsed:] 17189. Wright v. C., R. I. & P. R. Co. Writ of Error. Supreme Court of Nebraska. Filed Apr. 28 1914. H. C. Lindsay, Clerk.

829 And afterwards, to-wit, on the 29th day of April, 1914, there was filed in the office of the clerk of said supreme court, a certain Præcipe for Transcript of Record on Writ of Error from the United States supreme court, which said original Præcipe with acknowledgement of service thereof endorsed thereon is attached hereto marked Exhibit "E."

# 830 EXHIBIT "E."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of the State of Nebraska.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the Estate of Otto O. Wright, Deceased, Plaintiff- and Appellees,  
vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant and Appellant.

*Præcipe for the Preparation of a Transcript of the Record.*

To Harry C. Lindsay, clerk of the supreme court of the State of Nebraska:

In the preparation of a transcript of the record in the above entitled case, in compliance with the writ of error directed to the supreme court of the State of Nebraska by the supreme court of the United States, you will please insert the following portions of the record, and the following papers now on file in your office:

1. A complete copy of the records of the trial court now on file in your office, the same being the transcript of the above entitled cause filed in your office, and the bill of exceptions.

2. A complete copy of the record of the proceedings of the supreme court of the State of Nebraska in the above entitled case, including the original assignment of errors, found on pages three to seven in the original brief of the appellant filed herein; a copy of the opinion of the supreme court of the State of Nebraska in the above entitled case, together with the dissenting opinion filed therein, and the judgment of said court; and the ruling by said court on the motion for re-hearing and the judgment thereon, and the opinion written therein, together with the dissenting opinion filed therein; original petition for a writ of error from the supreme court of the United States to the supreme court of the state of Nebraska, together with its allowance in the above entitled case, and the order allowing the same and fixing a supersedeas, a copy of the bond and its approval by Chief Justice M. B. Reese of the supreme court of the state of Nebraska; the original writ of error with the allowance thereof; the original citation with service thereon; the certificate of lodgement; præcipe for the preparation of the transcript; return to the writ of error and statement of costs; authentication of the record.

HOLMES & DE LACY,  
*Attorneys for Appellant, The Chicago Rock  
Island & Pacific Railway Company.*

I, George W. Berge, attorney of record for Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, deceased, plaintiffs and appellees in the above entitled case, hereby acknowledge service of the præcipe for the preparation of the transcript of record in the above entitled case.

*Attorney of Record for Lizzie L. Wright and  
Henry C. Berge, Administrators of the Estate  
of Otto O. Wright, Deceased, Plaintiffs and  
Appellees.*

*Proof of Service.*

STATE OF NEBRASKA,  
*Lancaster County, ss:*

G. L. De Lacy being first duly sworn on his oath deposes & says that he is one of the attorneys for the Chicago, Rock Island and Pacific Railway Company and that on the 29th day of April, 1914, he served a true & correct copy of the above "præcipe for the preparation of a transcript of the record" upon G. W. Berge attorney of record for Lizzie P. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, Deceased, defendants in error, in person and upon him personally.

Further affiant sayeth not.

G. L. DE LACY.

Subscribed and sworn to before me this 29th day of April, 1914.

EMMA HAHLBECK,

*Notary Public.*

832 In the Supreme Court of the State of Nebraska. Lizzie L. Wright et al., Plaintiff- and Appellees, vs. The Chicago, Rock Island & Pacific Railway Company, Defendant and Appellant. Præcipe. Supreme Court of Nebraska. Filed Apr. 29, 1914. H. C. Lindsay, Clerk. Paul E. Walker, Holmes & DeLacy, Attorneys for Appellant.

833 And afterwards, to wit, on the 30th day of April, 1914, there was filed in the office of the clerk of said supreme court a Supersedeas Bond, in the sum of \$25,000.00, said bond having been duly approved and which said bond and approval thereof are in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the Estate of Otto O. Wright, Deceased, Plaintiff- and Appellees,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Know all men by these presents, That, we, the Chicago, Rock Island & Pacific Railway Company, a corporation, as principal, and The United States Fidelity & Guaranty Co. of Baltimore as surety are held and firmly bound unto Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, deceased, in the sum of \$25,000.00 to be paid to the said Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, deceased, to the payment of which well and truly to be made we bind ourselves, our successors, heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 29th day of April, A. D. 1914.

Whereas, the above named appellant, the Chicago, Rock Island & Pacific Railway Company, a corporation, seeks to prosecute its writ of error in the supreme court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the state of Nebraska,

834 Now, therefore, the condition of this obligation is such that if the above named appellant, the Chicago, Rock Island & Pacific Railway Company, shall prosecute its said writ of error to effect and answer all costs and damages rendered and to be rendered if it shall

fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY COMPANY,

By E. P. HOLMES,

*Its Agent and Attorney.*

[SEAL.]

THE UNITED STATES FIDELITY &  
GUARANTY CO.,

By O. W. PALM,

*Attorney in Fact.*

STATE OF NEBRASKA,

*Lancaster County, ss:*

On this 29th day of April, A. D. 1914, personally appeared before me, E. P. Holmes, who being duly sworn deposes and says that he is agent and attorney for the Chicago, Rock Island & Pacific Railway Company, and as such agent and attorney is authorized to sign the foregoing instrument, and the said E. P. Holmes acknowledged the said instrument to be the free act and deed of said corporation.

EMMA HAHLEBECK,

*Notary Public.*

This bond approved by me this 30 day of April, 1914.

[SEAL.]

JACOB FAWCETT,

*Acting Chief Justice of the Supreme Court  
of the State of Nebraska.*

Endorsed: 17189. In the Supreme Court of the State of  
835 Nebraska. Lizzie L. Wright et al., Plaintiff- and Appellee,  
vs. Chicago, Rock Island & Pacific Railway Company, a cor-  
poration, Defendant and Appellant. Bond. Supreme Court of Ne-  
braska. Filed Apr. 30, 1914. H. C. Lindsay, Clerk. Paul E.  
Walker, Holmes & De Lacy, Attorneys for Appellant.

And afterwards, to-wit, on the 1st day of May, 1914, there was filed in the office of the clerk of said supreme court a certain Order of the Court concerning Exhibits, which said Order was entered of record upon the journal thereof, and is in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, May 1.

17189.

LIZZIE L. WRIGHT et al., Appellees,

v.

CHICAGO, ROCK ISLAND & PACIFIC R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause came on for hearing upon the application of the plain-  
tiff in error in the above entitled case for an order directing that

the original papers and exhibits introduced in evidence in the above entitled case be sent to the supreme court of the United States with the transcript of the proceedings in said cause, and it appearing to me that it is necessary and proper that said original exhibits introduced in evidence by plaintiff and defendant should be inspected by the supreme court of the United States and should be sent up with said transcript, it is hereby ordered that the following described original papers and exhibits be *transported* by the clerk of the supreme court of the State of Nebraska to the clerk of the supreme court of the United States at Washington, to be safely kept by him with the records in the above entitled case, so that the same may be considered by the said United States supreme court upon the 836 hearing and presentation of the appellant's writ of error, and that after said hearing and after the decision of said case, that the same be returned by said clerk to the clerk of the supreme court of the State of Nebraska:

Exhibit No. 1, Map.

Exhibit No. 2, Map.

Exhibits No. 3 to 8 inclusive, Pictures.

Exhibits No. 9, Time Table.

Exhibit No. 10, Clearance card and orders.

Exhibits No. 11 to 18 inclusive, Orders.

Exhibit No. 19, Pictures.

Exhibit No. 22, Book of Rules.

Exhibit No. 23, Blue print of engine.

Exhibit No. 24, Blue print of engine.

M. B. REESE,

*Chief Justice of the Supreme Court  
of the State of Nebraska.*

837

*Authentication of Record.*

SUPREME COURT,

*State of Nebraska, ss:*

I, H. C. Lindsay, Clerk of said court, do hereby certify that the foregoing pages numbered from 1 to 836, inclusive, are a true, full and complete transcript of the Record and proceedings in the case of Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, deceased, Plaintiffs and Appellees vs. Chicago, Rock Island & Pacific Railway Company, a corporation, Defendant and Appellant, No. 17189; and also of the opinions and dissenting opinions of the court rendered therein, and of the Defendant's and Appellant's Assignment of Errors contained on pages 3 to 7 of its original Briefs filed in this court on June 3, 1912, as the same now appear on file in my office.

I further certify that the Exhibits appearing on pages 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, of this transcript, are the identical Exhibits which were attached to the Bill of Exceptions in said case and on file in my said office; and that said Exhibits are the Exhibits

and all the Exhibits mentioned in the order of the Supreme Court of Nebraska, directing same to be forwarded to the Clerk of the Supreme Court of the United States, and a copy of which order appears at page 835 of this transcript.

838 In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this May 19th 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,  
*Clerk Supreme Court, State of Nebraska.*

839 *Certificate of Lodgement.*

Supreme Court.

STATE OF NEBRASKA, ss:

I, H. C. Lindsay, Clerk of said court, do hereby certify that there was lodged with me as such clerk, on April 28, 1914, in the matter of Lizzie L. Wright, and Henry C. Berge, Administrators of the estate of Otto O. Wright, deceased, vs. Chicago, Rock Island and Pacific Railway Company, a corporation, three copies each of the Writ of Error and Assignment of Errors, as herein set forth, one for each Plaintiff and one copy of each to file in my office.

I further certify that on the 30th day of April, 1914, there was lodged with me as such clerk, in said Action, the original Superseas Bond, in the sum of \$25,000.00, of which a copy is herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this 19th day of May, 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,  
*Clerk Supreme Court, State of Nebraska.*

840 *Return to Writ.*

UNITED STATES OF AMERICA,  
*Supreme Court of Nebraska, ss:*

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the

seal of the said Supreme Court of Nebraska in the City of Lincoln,  
this May 19th 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,  
*Clerk Supreme Court, State of Nebraska.*

Costs of transcript \$115.00.

841 In the Supreme Court of the United States.

LIZZIE L. WRIGHT and HENRY C. BERGE, Administrators of the Es-  
tate of Otto Wright, Deceased, Appellee,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Appellant.

*Stipulation.*

Whereas, it appears that certain exhibits have been improperly in-  
corporated in the Bill of Exceptions or transcript, said exhibits  
extending from page 733 to page 754 of the transcript,

Now therefore, it is hereby stipulated between the parties in the  
above entitled cause that the exhibits extending from page 733  
to page 754 of the transcript shall be omitted in the printing of the  
record, said exhibits being more particularly described as follows:

Exhibit No. 1, Map.

Exhibit No. 2, Map.

Exhibits 3 to 8 incl., Picture.

Exhibit No. 9, Time table.

Exhibit No. 10, Clearance cars and orders.

Exhibit No. 11 to 18 inc., Orders.

Exhibit No. 19, Picture.

Exhibit No. 22, Book of rules.

Exhibit 23, Blue print of engine.

Exhibit 24, Blue print of engine.

but that said exhibits shall be exhibited to the Court as though re-  
produced in printed record, but waiving no jurisdictional questions.

Given under our hands this 10th day of July, 1915.

LIZZIE L. WRIGHT AND

HENRY C. BERGE,

*Admsrs.,*

By HALLECK T. ROSE,

G. W. BERGE,

*Their Attorneys.*

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY,

By E. P. HOLMES AND

PAUL E. WALKER,

*Its Attorney.*

842 [Endorsed:] 167—15/24245. In the Supreme Court of the United States. Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto Wright, deceased, Appellee, vs. The Chicago, Rock Island and Pacific Railway Company, a corporation, Appellant. Stipulation.

843 [Endorsed:] File No. 24,245. Supreme Court U. S., October term, 1915. Term No. 167. The Chicago, Rock Island & Pacific R. R. Co., Pl'ff in Error, vs. Lizzie L. Wright et al., etc. Stipulation to omit exhibits in printing record. Filed July 24, 1915.

Endorsed on cover: File No. 24,245. Nebraska Supreme Court. Term No. 167. Chicago, Rock Island & Pacific Railway Company, plaintiff in error, vs. Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, deceased. Filed May 28th, 1914. File No. 24,245.

FILED  
OCT 20 1915  
JAMES J. HANER

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

October Term, 1915.

Number **167**

LIZZIE L. WRIGHT AND HENRY C. BERGE, ADMINIS-  
TRATORS OF THE ESTATE OF OTTO G. WRIGHT,  
DECEASED, DEFENDANTS IN ERROR.

VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY, A CORPORATION, PLAINTIFFS IN  
ERROR.

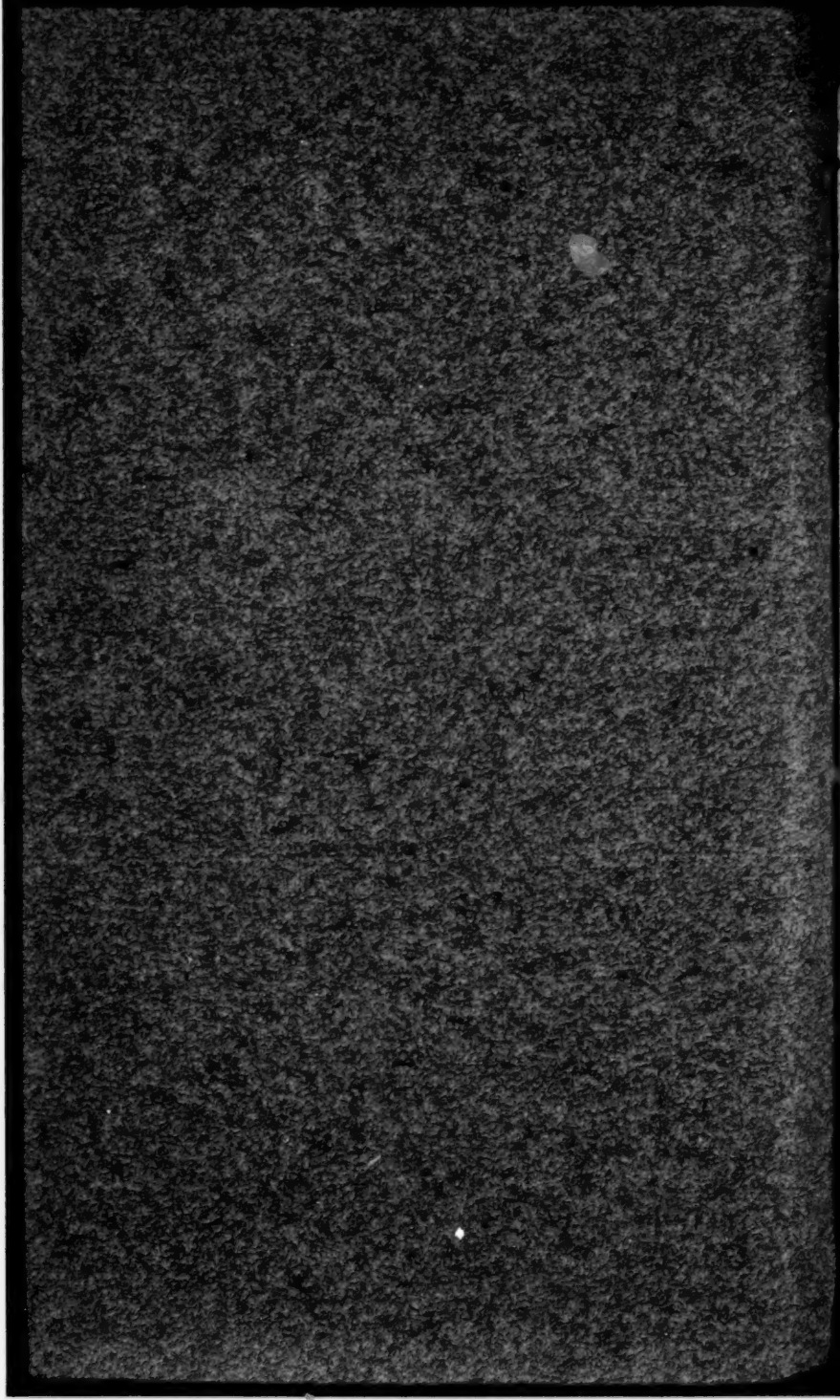
IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION TO DISMISS OR AFFIRM, BRIEF AND TRANSCRIPT  
OF RECORD.

HALLIDAY E. ROSE, Attorney and Counsel for Defendants in  
Error, Chicago, Illinois.

GEORGE W. BIRCH, Lincoln, Nebraska, in Contact.

WITNESSED, the Clerk of said Court, at Chicago,



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# CASE MADE.

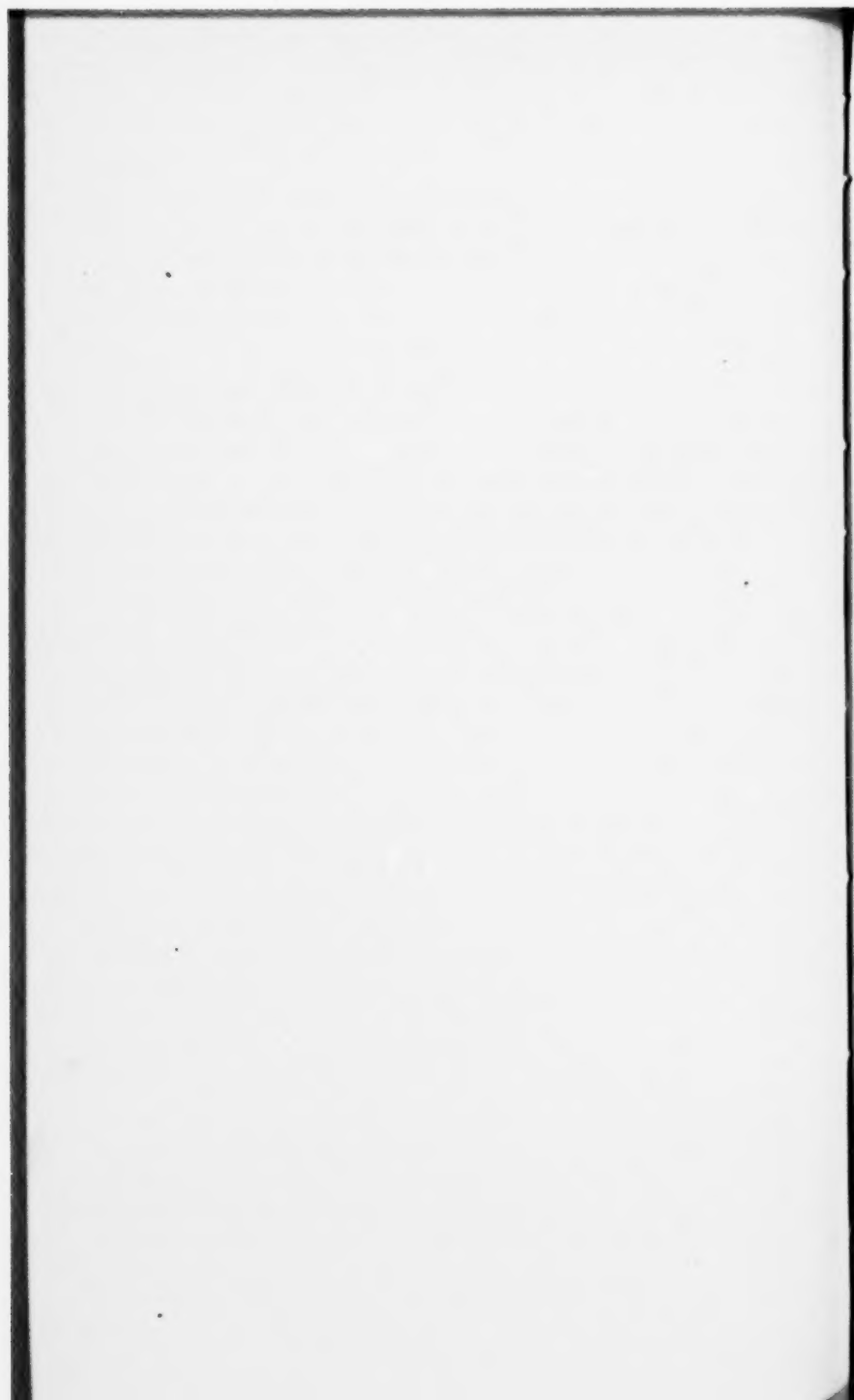
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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

October Term, 1915.

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Number 505.

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LIZZIE L. WRIGHT AND HENRY C. BERGE, ADMINIS-  
TRATORS OF THE ESTATE OF OTTO O. WRIGHT,  
DECEASED, DEFENDANTS IN ERROR,

VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY, A CORPORATION, PLAINTIFFS IN  
ERROR.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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**MOTION TO DISMISS OR AFFIRM, BRIEF AND TRANSCRIPT  
OF RECORD.**

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HALLECK F. ROSE, *Attorney and Counsel for Defendants in  
Error, Omaha, Nebraska.*

GEORGE W. BERGE, *Lincoln, Nebraska, of Counsel.*

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**MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM OR  
TO TRANSFER TO THE SUMMARY DOCKET.**

Now come the defendants in error, Lizzie L. Wright and  
Henry C. Berge, administrators of the estate of Otto O.  
Wright, deceased, by their attorneys of record herein, and  
move this honorable court:

(1) To dismiss the writ of error herein on the ground that this court has no jurisdiction thereof, no federal question being involved therein.

(2) To affirm the judgment and decision of the supreme court of the state of Nebraska on the ground that it is manifest this writ of error was taken for delay only, and that the questions on which the decision of this cause depend are so frivolous as not to need further argument.

(3) To transfer this cause for hearing to the summary docket if this court should refuse to dismiss or to affirm, because the case is of such a character as not to justify extended argument.

*Shelley J. Rose*

Omaha, Nebraska,

*Attorney and Counsel for Defendants in Error.*

GEORGE W. BERGE,  
Lincoln, Nebraska,  
*Of Counsel.*

#### NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendants in error will on Monday, the 11th day of October, 1915, on the meeting of the supreme court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of said court the foregoing motions, and each of them, and the brief in support thereof hereto attached, including portions of the record in said cause as contained in an appendix thereof, all of which are now served upon you herewith.

*Shelley J. Rose*

Omaha, Nebraska,

*Attorney and Counsel for Defendants in Error.*

GEORGE W. BERGE,  
Lincoln, Nebraska,  
*Of Counsel.*

**STATEMENT AS TO APPENDIX.**

For the purpose of these motions defendants in error, pursuant to rules and practices, have caused to be printed as an appendix to this brief portions of the record embodying all matters contained in the record bearing upon the question involved herein, omitting those parts which are not essential to the consideration of the motion; this appendix contains all of the evidence in the record showing that the engine which the deceased was running when he was killed was not commercially used, but was a lone and disabled engine on its way to repair shops for repairs, and that the deceased at the time he was killed had written running orders within two points in the state. (The transcript of record was not yet printed when this motion and brief were prepared.)

*Carey v. Houston T. C. R. Co.*, 150 U. S. 179.

*Roach v. Nevin*, 128 U. S. 578.

We have also printed in the appendix hereto attached the petition for writ of error; the order of the chief justice of the supreme court of Nebraska allowing the writ of error; the writ of error; the assignment of errors; the petition upon which the case was tried in the district court; the answer upon which the case was tried in the district court and the reply thereto; the instructions tendered by the plaintiff in error asking that the case be submitted under the rule of comparative engligence as found in the State Employers' Liability Act; the instructions of the court submitting the case under the rule of comparative negligence as found in the State Employers' Liability Act and exactly as requested by the plaintiff in error; both State and Federal Employers' Liability Acts; the verdict of the jury; the motion for new trial by the plaintiff in error; the order of the court overruling this motion and requiring a remittitur; the remittitur filed by the defendant in error; the alleged assignments of error on the part of plaintiff in error in its brief in the supreme court of Nebraska (no assignments were made except in its brief); the opinion of the supreme court of Nebraska affirming the judgment of the lower court; the assignments for rehearing in its

brief filed by the plaintiff in error in the supreme court, and the opinion overruling the same.

We quote in the following brief portions of the record which are regarded as germane to this motion.

### STATEMENT OF FACTS.

Otto O. Wright, while an employee of the plaintiff in error, and while acting as engineer, was killed on the 9th day of December, 1909, in Lincoln, Nebraska. Suit was brought by defendants in error in their representative capacity in the state court. Defendants in error alleged in paragraph 4 of their petition that the defendant during all the times mentioned in the petition owned and operated a line of railroad through the state of Nebraska and was doing business as a common carrier of freight and passenger in said state, and as such common carrier owned and maintained roadbeds, rights-of-way, tracks, engines, tenders, and cars, and employed engineers, firemen, brakemen, flagmen, switchmen and trainmen of every kind to operate and control the movement of its trains and switch engines, and maintained depots and train dispatchers, and generally owned property and employed men to conduct its railroad business in the state of Nebraska; and then in paragraph 5 of their petition they alleged (Appendix, p. 40):

"That at the time and for several years prior to the time of the commission of the wrongs and injuries herein complained of, said deceased, Otto O. Wright, was employed by the defendant as a locomotive engineer upon its lines of railroad; *that on or about the 9th day of December, 1909, the deceased, Otto O. Wright, was sent with an engine of the defendant from Fairbury, Nebraska, to Omaha, Nebraska, for the purpose of taking said engine to a repair shop for repairs, and while taking said engine where he had been directed by the defendant, and while on his way, and on the 9th day of December, 1909, the defendant, through its servants, agents and employees, carelessly and negligently ran another engine, being a switch engine, violently against and into the engine that plaintiffs' intestate was running, whereby plaintiffs' intestate was caught between the cab and tender of his engine, pinioned beneath the wreckage of his engine, and subjected to injuries that resulted almost immediately in his death.*"

Then the petition described the place of the injury, which occurred in a deep cut and abrupt curve, so that trainmen and engineers could see only about 420 feet. The petition specifically set out the acts of negligence; that the plaintiff in error was guilty of the grossest kind of negligence, and that the deceased was entirely free from negligence, was clearly shown by the evidence. The supreme court of Nebraska (*Wright v. Railroad*, 143 N. W. 223) said concerning the negligence of plaintiff in error:

"It is thus clearly established that 1220 must have been running at a high rate of speed, or that the emergency brake was not applied and the engine reversed before the crew jumped from the engine. It is testified to by some of the crew of 1220, and conceded in the brief of defendant, that at the time McKinstry discovered 1486 approaching it was at least 50 feet north of the viaduct. That fact being established, and also the fact that the collision occurred not over 100 feet north of the viaduct, it stands established as a fact that 1486 did not run to exceed 50 feet after its engineer, Wright, discovered the approach of 1220. A photograph introduced in evidence was taken at a point 420 feet north of the viaduct. It shows the barn above referred to, the cut and curve, and the rails of the track from that point to the viaduct, and clearly shows that at any point within that 420 feet two engines approaching from opposite directions would have a clear view of each other; 1486 being 50 feet north of the viaduct, it is beyond question that the point of view in the photograph could have been extended that number of feet further north, so that there was a clear, open view of the track for the entire distance of 420 feet when the engines came within the vision of the two engineers. Of that 420 feet, 1486 only traveled about 50 feet when the collision occurred, while 1220 traveled 370 feet. As we view the record, there is no escape from these facts. This being true, then, the conclusion is irresistible that the engineer of 1486 was proceeding north with his engine under full control; that the engineer of 1220 was proceeding south with his engine not under full control, but traveling at such a rate of speed that he was unable to stop it within a distance of 370 feet, and that, even after traveling that distance, his engine was still going at the rate of two or three miles an hour."

The petition as a whole avers facts which state a cause of action under the State Employers' Liability Act. Then the plaintiff in error in its answer, and in paragraph 5 (Appendix, p. 49), says:

"And that at the time of the injury complained of in plaintiffs' petition the said engine was being taken, and the said Otto O. Wright was taking the same, from Fairbury, Nebraska, to Silvis, Illinois, and that at the time of his injury and death the said Otto O. Wright was employed by this defendant in interstate commerce, and was engaged in interstate commerce, and that this court by reason thereof is without jurisdiction of the subject matter of the suit."

Except what is above quoted there is nothing in the answer referring to any federal question. In this portion of its answer it states the conclusion that the deceased was engaged in interstate commerce and "*That therefore the state court was without jurisdiction of the subject matter of the suit.*" In this, of course, plaintiff in error was in error, because even though the deceased had been engaged in interstate commerce still the state court would have jurisdiction to try the case.

*Employer's Liability case*, 223 U. S. 2.

Plaintiff in error in its answer does not question the validity of the Federal Employer's Liability Act; it asked for no particular construction of this Federal act; it specially set up no claim of federal right under this act, as required by section 709 Revised Statutes; it did not ask that the state court try the case under the Federal act; in its answer it only questioned the jurisdiction of the state court because it claimed that the deceased was engaged in interstate commerce.

The case was tried to the court and jury and the only evidence in the record on the question of the kind of commerce the deceased was engaged in is set out on pages 50-52 of the appendix attached to this brief. This evidence in brief is that the deceased had written running orders from Fairbury to Albright, both points in Nebraska; (For written orders see Appendix, page 50) that he was running a lone and disabled engine to repair shops for repairs; and it is undisputed

in the record that the lone and disabled engine on its way to the shops for repairs was not commercially used.

Under this evidence and these admitted facts counsel for plaintiff in error and the trial court assumed, without question, that the right of recovery of defendants in error arose under the state law. No claim was made by counsel when the case was tried that the deceased was engaged in interstate commerce when he was killed; it was conceded by counsel for plaintiffs in error that the right of recovery if any must be under the state law. Counsel for plaintiff in error tendered the instructions set out on pages 52-53 of the appendix. In these instructions plaintiff in error invoked the rule of comparative negligence as provided for in the state act. The state act is more favorable to the plaintiff in error than the federal act. Under the state act and under the instructions as requested by the plaintiff in error if the jury should find that the deceased was guilty of more than slight negligence defendants in error could not recover. This is not the federal act; under the federal act even though the deceased was guilty of more than slight negligence still his representatives could recover. The court adopted the instructions tendered by the plaintiff in error and submitted the case under the state act, and gave practically the identical instructions tendered by the plaintiff in error. Under these circumstances it must be taken as settled that the right of recovery arose under the state law.

After the verdict was returned, and within three days, plaintiff in error filed a motion for a new trial, as required by the Nebraska practice. This motion will be found on pages 57-63 of the appendix. There is not a single assignment of error in this motion claiming any rights under any federal act. No complaint is made here because the case was submitted to the jury under the state act, and no complaint is made here even of the jurisdiction of the state court which was claimed in the answer. No doubt counsel were aware by this time that the state court had jurisdiction to try cases even under the federal act. The real reason, however, why no complaint was made in the motion for a new trial of the denial of any fed-

eral right was because it was conceded by it at that time that under the undisputed evidence the deceased was not engaged in interstate commerce when he was killed.

Then plaintiff in error in its assignment of errors in its brief in the supreme court of Nebraska, and not in any pleading filed in the case, and being assignment No. 50, for the first time says:

"The court erred in submitting the case to the jury upon the theory that a recovery was permissible under the Nebraska Employers' Liability Act when the evidence disclosed that the decedent was running from Fairbury, in Nebraska, to Council Bluffs, in Iowa, and was engaged in interstate commerce at the time of his injury, and the said cause should have been tried under the Federal Employers' Liability Act."

Then, in its re-hearing brief filed in the supreme court of Nebraska, and in assignment No. 9 thereof, the plaintiff in error says:

"The court erred in holding and in finding that Mr. Wright was not engaged in interstate commerce."

Counsel say this in their briefs in the supreme court in the face of the fact that the written running orders of the deceased were from Fairbury, Nebraska, to Albright, Nebraska; and in the face of the fact that the engine was in no sense commercially used, but was a lone and disabled engine being taken by the deceased to repair shop for repairs; and also they say this in their briefs in the face of the fact that there is not a word or syllable of evidence supporting such a claim in the record; and in the face of the fact that they asked the court in their instructions to submit the case to the jury, on these admitted facts, under the state act; and they say this in the face of the fact that in their motion for a new trial in the trial court they made no complaint whatever because the case was submitted under the state act.

And the above quotations from the briefs of plaintiff in error are the only complaints made by it in the supreme court. It did not specially set up or claim a single federal right and the

supreme court denied it no federal right specially set up. This record does not show that even in the supreme court that there was presented any definite issue as to the correct construction or application of the federal act. This record does not show that the judicial mind of the Nebraska Supreme Court was exercised upon any federal right specially set up by plaintiff in error under the federal act. Simply claiming that the case should have been submitted under the federal act does not give this court jurisdiction.

We have printed in the appendix both the State and Federal Employer's Liability Acts (pages 55-57). It will be seen that the state act was much more favorable to the plaintiff in error than the federal act and that plaintiff in error was denied no rights but secured more favorable instructions than it would have been entitled to under the federal act.

At the time the deceased was killed and when this case was tried, Nebraska had no statute modifying the common law rules on assumption of risks, and the instructions given by the court on assumption of risks gave the plaintiff in error the full benefit of that law and there is no federal provision modifying the common law rules which would have been more favorable to the plaintiff in error. Except that the contributory negligence section in the state act is more favorable to the railroad company than the federal section, the state and federal acts in every respect are in effect identical.

### POINTS AND AUTHORITIES.

#### I.

**A Necessary Movement of a Defective Empty Car or Engine Alone For the Purpose of Repair Only And Not in Connection With Any Cars Commercially Used Does Not Constitute Interstate Commerce; And in Such a Case it Matters Not Whether the Defective Car or Engine is Being Transported Between Two Points in a State or Whether it Crosses State Lines.**

*C. & N. W. Ry. Co. v. United States*, 168 Fed. 236.

*United States v. Rio Grande Western Ry. Co.*, 174

Fed. 399.

*Siegel v. N. Y. Central and H. R. R. Co.*, 178 Fed. 873.

*Johnson v. Southern Pac. R. Co.*, 196 U. S. 1.

*Taylor v. Boston & M. R. R.*, 74 N. E. 591.

*Southern Ry. Co. v. Snyder*, 187 Fed. 492.

*St. Louis Ry. Co. v. Delk*, 158 Fed. 931.

*United States v. So. Pac. R. Co.*, 169 Fed. 407.

*Chicago Junction Ry Co. v. King*, 169 Fed. 372.

*McLaughlin v. Union Railway Co.*, — Tenn. —.

*Railway v. Bowles*, 15 So. 138.

*Bresky v. Minncapolis & N. L. Ry. Co.*, 132 N. W. 337.

*Illinois C. R. Co. v. Behrens*, 233 U. S. 473.

The petition averred in paragraph 5 (appendix page 40) :

*"That on or about the 9th day of December, 1909, the deceased Otto O. Wright, was sent with an engine of the defendant from Fairbury, Nebraska, to Omaha, Nebraska, for the purpose of taking said engine to a repair shop for repairs."*

The only evidence in the record touching the character of the employment of the deceased when he was killed is as follows (Appendix, pages 50-52) :

*"Engine 1486 will run extra Fairbury to Albright."*

The above order is the train order delivered to the deceased and as the evidence later will show both of these points are within the state of Nebraska.

William C. Cavanaugh, chief train dispatches for the defendant and residing at Fairbury, and testifying concerning Exhibit "9" in the record, which is the time table, says :

Q. 413. Trains on your system between Fairbury and Albright or South Omaha were operated under that time table? A. Yes, between Fairbury and Albright.

Q. 414. Between Fairbury and Albright? A. Yes, sir.

Q. 572. What was the purpose of taking that engine up there? Do you know? A. It was on her way to the shop.

Q. 573. Do you know of your knowledge whether he had a full train crew with him? A. He had all that the law requires and what we run all light engines with, an engineer and fireman and a flagman.

Q. 577. This engine No. 1486? A. Yes, sir.

Q. 578. A light engine or heavy? A. A light engine.

Q. 579. Do you know that of your own knowledge?  
A. Yes. Pardon me, I don't know what you mean between a light and a heavy engine.

Q. 580. I was going to ask you. A. What we call a light engine is an engine going without any cars, not the size of the engine.

Q. 618. I will ask you another question. I will ask you whether Exhibits 15 and 14 originated in your office and had to do with the running orders of Wright from Fairbury to Albright? A. Yes.

Q. 629. When he got his train order at Fairbury in the morning, say to run to Albright, that was his order, wasn't it? He had a right to go to Albright? A. Yes, sir.

Q. 683. Now the running order of Mr. Wright from Fairbury to Albright, what kind of an order do you call that? A. 31 order.

E. E. McLANE, who was fireman on deceased's engine at the time he was killed, testified as follows:

Q. 3439. State what kind of a train that was that day that you and Mr. Wright was on. A. We had no train whatever, just a lone engine.

Q. 3440. Do you remember now the number of the engine. A. Yes, sir.

Q. 3441. What was the number? A. 1486.

Q. 3494. I wish you would state whether this engine was a large engine or a small engine. A. It was a pretty large engine.

Q. 3495. Do you know why you were going from Fairbury to Council Bluffs with a lone engine that day?

Q. 3836. What for?

Q. 3837. Taking it for repairs? A. Yes, sir.

L. H. HINNITT, who was brakeman on the engine when deceased was killed, testified:

Q. 4121. What kind of a train were you running that day, did you have a train or just an engine? A. Do you mean to specify the class of train?

Q. 4122. No, any cars? A. A light engine.

Q. 4123. Did you have anything but an engine and coal car? A. No, very light engine; tank and engine is a light engine.

Q. 4124. The engine takes in coal car and tank. A. Yes, sir.

Q. 4125. What were you that day, brakeman, flagman or what? A. I was called flagman, but it is all the same in our terms.

Q. 4126. That is a flagman and a brakeman is the same? A. Yes, sir.

Q. 4386. Do you know of your own knowledge where you were going and what for? A. Do I know of my own knowledge where I was going and what for?

Q. 4369. What was the purpose you were going to Council Bluffs with this engine? A. Well, I can say only from hearsay. The engine was going to the shops.

Q. 4370. For repairs? A. For repairs.

This evidence is undisputed. This shows that the deceased when he was killed was running a lone and disabled engine to repair shops for repairs, and that it was not in any sense commercially used. It follows, under this evidence and these authorities, that the deceased was not engaged in interstate commerce, and a decision of this question really disposes of the entire case. In *Chicago & N. W. Ry. Co. v. United States*, 168 Fed. 236, above cited, Section 2 of the Syllabus is as follows:

"The necessary movement of a defective empty car alone, for purpose of repair only, and not in connection with any cars commercially used, does not subject the carrier to the penalties of the acts."

Then section 3 is as follows:

"A carrier may move empty cars by themselves to repair shops, for the purpose of having them placed in condition to conform to the safety appliance act (March 2, 1893, c. 196, Sec. 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], as amended by Act March 2, 1903, c. 976, Sec. 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 886]), without being guilty of a violation of those acts while thus engaged in an honest effort to meet their requirements."

The complaint in that case alleged:

"The defendant, on or about June 7, 1906, hauled on its line of railroad one car, to-wit, its own, No. 69581; said car being an empty car and generally used in the movement of interstate traffic, said car, at the time of the violation of the above act, being consigned from Omaha, in the state of Nebraska, to Council Bluffs, in the state of Iowa."

The answer admits these facts and alleges that the defect in the car was discovered while it was in the yards at South Omaha, Nebraska; that the most convenient place of repair was at the defendant's shops in Council Bluffs; that the car was empty and was moved from Omaha to Council Bluffs, for the sole purpose of being repaired.

The court will observe that the car was moved from one state to another. The court says:

"Reading these statutes together (safety appliance acts) as they have been interpreted by the courts, they include, first, vehicles actually moving interstate traffic; second, such vehicles though empty, when moving to points for the purpose of receiving interstate traffic, or otherwise commercially used by the carrier; and, third, vehicles used in connection with vehicles embraced in either of the two former classes. This would include cars that were out of repair and were being transported solely for the purpose of repair, if they were placed in trains whose vehicles come within either of the first two classes.

"The shovel car involved in the Schlemmer Case, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, 'was part of a train on its way through Pennsylvania from a point in New York.' The same is true of the cars referred to in *United States v. St. Louis, I. M. & S. R. Co.* (D. C.) 154 Fed. 516. In fact, so far as we have been able to examine the authorities, the cases in which carriers have been held liable for moving defective cars over their lines for purposes of repair have all presented the feature that such cars were moved in trains whose other vehicles were actually engaged in interstate commerce, and were used 'in connection with' such cars, within the meaning of the last clause of section 1 of the act of 1903.

"The present case, upon a fair construction of the pleadings involves a movement of the defective car alone

for purposes of repair only. In our judgment, neither the car nor the locomotive which hauled it was used in interstate commerce, within the meaning of section 4 of the act of 1893, or 'in connection with' any locomotive, tender, car, or similar vehicle engaged in such commerce within the provision of the act of 1903. \* \* \*

"\* \* \* The only practical method of railroading requires that such vehicles, when out of repair, shall be taken to the shops; and if they are wholly excluded from commercial use themselves, and from other vehicles which are commercially employed, they do not fall within any of the classes covered by the safety appliance act."

In the case cited above the defective car crossed state lines, but that made no difference; it was a defective car and was transported alone for repairs only; it was not in any sense commercially used, and of course it was not used in interstate commerce. That case is not as strong as the case at bar because in the case at bar the engine was being taken between two points in the state; it was disabled; it was transported alone for the single purpose of being taken to repair shops. It was not in any sense commercially used. How, then, can it be claimed that the deceased was engaged in interstate commerce under such circumstances?

In *U. S. v. Rio Grande*, 174 Fed. 399, above cited, Section 2 of the Syllabus is as follows:

"The necessary movement of a defective car alone for the purpose of repairs does not subject the carrier to the penalties of the act."

Then in the body of the opinion the court says:

"There was no evidence that this car was hauled over to the shop for any other purpose than to have the necessary repairs made upon it, or that its trip to the shop tracks was or could have been used for any other purpose than to secure the making of these necessary repairs."

"In this state of the case the charge of the court was warranted by the decision and opinion of this court in *Chicago & N. W. Ry. Co. v. United States*, (C. C. A.) 168 Fed. 236, 21 L. R. A. (N. S.) 690, and the judgment below is affirmed."

In *Seigel v. New York Central*, 178 Fed. 876, above cited, the court says:

"Repair shops, as it is pertinently said, can not be kept on wheels; and a carrier may therefore move one or more defective cars by themselves to such shops, for the purpose of having them put in a condition to conform to the requirements of the safety appliance acts, provided such cars are excluded from commercial use themselves, and from connection with other cars which are being used commercially."

In *Southern Railway Company v. Snyder*, 187 Fed. 492, above cited section 4 of the Syllabus is as follows:

"While a railroad may move empty cars by themselves to repair shops for the purpose of having them placed in condition to comply with the safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], and Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]), without being guilty of a violation of those acts, yet in so moving them for the purpose of repair, in order not to be subject to the acts, they must be wholly excluded from commercial use themselves, and from connection with other vehicles which are commercially used."

Then Section 5 is as follows:

"Cars being hauled to a place of repair in a purely intrastate train, composed only of such cars, or while on a repair track out of all connection with vehicles in commercial use, are not subject to Safety Appliance Act March 2, 1893, c. 196, Sec. 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1144)."

Then in the body of the opinion and on page 497, the court says:

"While a carrier may move empty cars by themselves to repair shops for the purpose of having them placed in condition to comply with the safety appliance acts, without being guilty of a violation of those acts, while engaged in an honest effort to meet their requirements, yet the cars, in any movement for the purpose of repairing them after they so become defective, must, in order not to be subject to the act, be wholly excluded from commercial use themselves, and from other vehicles which are commercially employed. (Citing authorities.)

"But we think that, notwithstanding the defendant did not seasonably repair the defect in the car, the latter

was not subject to the act while actually withdrawn from commercial use and from connection with vehicles in commercial use—for example, while being hauled to Lenoir in a purely intrastate train, composed only of cars carried for purpose of repair, or while retained on a repair track out of all connection with vehicles in commercial use.”

In *Bresky v. Minneapolis & St. L. Ry. Co.*, 132 N. W. 338, above cited it is held:

“But if after discharging its interstate cargo, the car is used in intrastate traffic, or if it remains idle in the yards or shops, awaiting repairs, or awaiting a future use for state or interstate business as may afterwards be determined, it is not, while so idle, ‘used in moving interstate commerce.’ ”

We submit that under this evidence and under these authorities cited that the question of the kind of commerce the deceased was engaged in when he was killed is not open to debate. Both the evidence and the law is all one way. Just because plaintiff in error says in its brief in the supreme court of Nebraska that the deceased was engaged in interstate commerce does not make it so. It points out no evidence sustaining its claim. Even though Wright's running orders has been from Fairbury, Nebraska, to Council Bluffs, Iowa, or Silvis, Illinois, this fact would not affect the character of his employment in the least, because, under the undisputed evidence, at the time he was killed, he was taking a lone and disabled engine, which was not commercially used, to repair shops for repairs. Under these circumstances the claim made by plaintiff in error that deceased was engaged in interstate commerce is frivolous in the extreme.

## II.

**The Federal Employer's Liability Act is in Pari Materia With the Federal Safety Appliance Act, And What is Interstate Commerce Under One Act Must be so Under the Other. At Least They Must be Construed Together.**

*North Carolina Ry. Co. v. Zachary*, Admr. of Burgers, 232 U. S. 248.

## III.

**The Court's Instructions Assume, Based Upon the Undisputed Evidence, That the Deceased at the Time He Was Killed Was Engaged Outside of Interstate Commerce, And the Plaintiff in Error Having Requested Such Instructions is Bound by Them, And it Must be Taken as Settled That the State Employers' Liability Act is Applicable to This Case and not the Federal Act.**

*Wabash R. R. Co. v. Hayes*, 234 U. S. 86.

In the opinion in the foregoing case this court held:

"That the injury did occur outside of interstate commerce was declared in the court's instruction to the jury, and the defendant, having requested the instruction, is bound by it. It therefore must be taken as settled that the right of recovery arose under the state law."

These are just the facts in the case at bar. After the evidence was all in the trial court, at the request of plaintiff in error (Appendix, pages 52-53), submitted the case under the State Employer's Liability Act. Even though the plaintiff in error had not requested this the court could not have done otherwise, but the fact that plaintiff in error asked the court to submit the case under the state act, and the court having accordingly done so, it does not lie in the mouth of plaintiff in error now to complain of the action of the court. We submit that the case above cited is decisive of the case at bar.

## IV.

**The Fact That a Case in the State Court Asserts a Claim Based on a Federal Statute Does Not Give This Court Jurisdiction To Review the Judgment Under Section 709 Revised Statutes, if None of the Exceptions are Based on the Refusal of the Court to Make a Definite Construction of the Act as Requested by the Plaintiff in Error.**

**Where the Case Comes up Under Section 709 Revised Statutes, This Court is not one of General Review. It can Re-examine Only Those Rulings Which Deny Federal Rights Specially**

**Set Up. It is the Duty of Counsel Asking in the State Court For a Particular Construction of a Federal Statute Involved in the Case to Put the Request in Such Definite Terms That the Record Will Show That it Was a Claim of Federal Right Specially Set Up, as Required by Section 709, in Order to Give This Court Jurisdiction.**

*Seaboard Airline Ry. v. Dural*, 225 U. S. 477.

*Lorell v. Newman*, 227 U. S. 413.

*De Lomars Ncr. G. & M. Co. v. Nesbitt*, 177 U. S. 527.

*Harding v. Illinois*, 196 Ill. 78.

*Sayward v. Demy*, 158 U. S. 180.

*Marcell v. Newbold*, 18 Howard, 511.

*Appleby v. Buffalo*, 221 U. S. 529.

*Speed v. McCarthy*, 181 U. S. 269.

*Gillis v. Stinchfield*, 159 U. S. 658.

*St. L. & Iron Mt. Ry. v. Taylor*, 210 U. S. 291.

*Yazoo & Miss. Valley Ry. Co. v. Wright*, 35 Sup. Court Report 130; and 235 U. S. 376-378-130.

*Chesapeake & Ohio Ry. Co. v. McDonald*, 214 U. S. 193.

*Chicago & N. W. Ry. Co. v. Gray*, decided May 3, 1915. 237 U. S. 399.

*Olympia Mining & Milling Co. Limited v. Kerns*, 236 U. S. 211.

In the case at bar plaintiff in error in the supreme court for the first time claimed that the case should have been submitted under the Federal Employer's Liability Act instead of the state act. No other claim is made in the state supreme court. Even this claim was not made in the trial court. There it specially asked the court to apply the state act. Plaintiff in error made no contention as to the meaning of the federal act; it set up no defense under it; it cannot be said under any of the decisions of this court that the plaintiff in error specially set up or claimed any federal rights whatever in the state court and that these rights were denied it.

In *Yazoo & Minn. Valley R. R. Co., v. Wright*, above cited, this court held:

"The Federal Supreme Court on a writ of error to a circuit court if appeals which rests on the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, Sec. 8657), *but involves no contention as to its meaning*, need only determine whether plain error was committed in relation to the principles of general law involved."

This was a case from the circuit court of appeals to this court. If it had been a case from the state supreme court to this court then this court would not even have the jurisdiction to determine whether plain error was committed in relation to the principles of general law involved.

This court in *Seaboard Airline Co. v. Duvall*, 225 U. S. 477, held:

"It was the obvious duty of counsel if they wished any particlear construction of the act to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right specially set up and denied by the court. 'It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it and then a decision against the right claimed under it.' Or at all events it must appear from the record that there was necessarily presented a definite issue as to the correct construction of the act so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error."

It is manifest that plaintiff in error did not specially set up or claim any federal right as contemplated by the statute and these decisions, and no federal right was denied plaintiff in error, and this court therefore has no jurisdiction and the writ of error should be dismissed.

## V.

**The Right to Proceed in an Action for Personal Injuries Under the Federal Employer's Liability Act May be Waived.**

*Graber v. Duluth S. S. & A. Ry. Co.*, 150 N. W. 490.

*Leora v. M. St. P. and S. S. M. Ry. Co.*, 146 N. W. 520.

*Hanson v. C. M. & St. P. Ry. Co.*, 146 N. W. 524.

*Wabash R. Co. v. Hayes*, 234 U. S. 84.

*Chesapeake & Ohio Ry. Co. v. McDonald*, 214 U. S. 191.

*Harding v. Illinois*, 196 U. S. 78.

In *Harding v. Illinois*, cited above, this court speaking through Justice Day, said:

"There is nothing to prevent a party from waiving a federal right of this character if he chooses to do so, either in express terms or as a necessary implication from his manner of proceeding in the case."

In *Chesapeake & Ohio Ry. Co. v. McDonald*, cited above, the last section of the syllabus is as follows:

"A federal constitutional objection may be waived so far as having the right of review of a judgment in the state court is concerned, where the question is not made in the state court by proper procedure."

In the body of the opinion in this case it is held:

"In *Harding v. Illinois*, 196 U. S. 78, it was held that a federal constitutional objection might be waived so far as having the right of review of a judgment in a state court was concerned, where the record in the case disclosed that the question was not made in the state court by a proper procedure or argument in support of the assertion of the federal question, and the state court had for that reason held the right to review the federal question waived."

In *Hanson v. C. M. & St. P. Ry. Co.*, cited above, section 1 of the syllabus is as follows:

"In an action for death it is too late on appeal to complain for the first time that the case was within the interstate commerce law, and that the state law was inapplicable, the objection being waived by not urging it below."

In the body of the opinion the court says:

"Upon the argument in this court the objection was for the first time made that the case was one within the federal act, *i. e.*, that the death of the testator occurred while he was employed in interstate commerce, and hence that the trial of the case, under the provisions of the state law, was a mistrial, and the judgment must in any

event be reversed. This is the identical question raised and disposed of in the case of *Leora v. M. St. P. & S. M. Ry. Co.*, 146 N. W. 520 (decided herewith). Under the principles stated in that case it must be held that the objection has been waived by reason of the fact that it was not raised in the trial court. We do not, therefore, consider the question whether the death of the testator occurred while he was employed in interstate commerce or not."

Even though deceased had been engaged in interstate commerce when he was killed, still, under the record in the case at bar, plaintiff in error could not be heard to say so. Under this record it waived all its rights to make any such claim.

Not only did the plaintiff in error utterly fail to specially set up or claim any federal right in the trial court in the state but it specially claimed and urged in the trial court that the case be submitted under the state law. In Nebraska the practice is that the supreme court reviews only questions tendered in the trial court. Before a law case can be reviewed in the supreme court of Nebraska a motion for a new trial must be filed within three days after the verdict setting up the errors complained of. Plaintiff in error filed such a motion but no complaint is made in this motion because the case was submitted under the state law. If ever a litigant waived a federal right plaintiff in error would have waived it in this case if any such federal right had existed.

## VI.

**In the Case at Bar the Evidence is all One Way, Showing Conclusively That the Deceased Was Engaged Outside of Interstate Commerce. Suppose, However, as a Matter of Fact, He Had Been Engaged in Interstate Commerce But the Evidence Showing This Fact Had Been Excluded by the Trial Court, Still This Would be Error Without Prejudice Where the Railway Company's Position Was Made no Worse Because the Case Was Tried Upon the Hypothesis That the State Law Governed.**

*Chicago & N. W. Ry. Co. v. Gray*, decided May 3, 1915. 237 U. S. 399.

The syllabus in the above case is as follows:

"The rejection of evidence as to the interstate character of the railway and of the employment, offered for the purpose of making the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, sec. 8657), applicable to a personal injury action brought by an employee against a railway company, if error, does not require the reversal of a judgment in favor of the employee, where the railway company's position was made no worse because the case was tried upon the hypothesis that the state law governed."

In the case at bar the deceased, as a matter of fact, was not engaged in interstate commerce when he was killed. But suppose, for the sake of the argument, he was, was the company's position made worse because the case was tried upon the hypothesis that the state law governed? Just the contrary is the fact. It clearly appears from a comparison of the State and Federal Employers Liability Acts and the instructions given by the court that the company gained a decided advantage because the case was tried upon the hypothesis that the state law governed. It would be strange indeed if the plaintiff in error could in the trial court ask to have this case submitted under the State Employer's Liability Act, which was more favorable to it than the federal act, and then, after having gained that distinct advantage in the trial court, come to this court and predicate error upon the very advantage gained. Of course the case cited applies only if the deceased had been engaged in interstate commerce, but, as repeatedly stated herein the evidence is all one way that he was not. He was engaged at the time he was killed outside of interstate commerce, and we only cite this authority to show how frivolous is the claim of plaintiff in error.

## VII.

**Questions of Fact Which are Merely Preliminary to or the Possible Basis of a Federal Question are Not in Themselves Federal.**

*Telluride v. Rio Grande R. R. Co.*, 175 U. S. 639.

*Telluride v. Rio Grande R. R. Co.*, 187 U. S. 569.

*Crary v. Devlin*, 154 U. S. 619.

*Mining Co. v. Boggs*, 3 Wall. 304.

*Dower v. Richards*, 151 U. S. 659.

*Speed v. McCarthy*, 181 U. S. 269.

### VIII.

Nor Does This Court Sit to Review the Findings of Facts Made In the State Court, but Accepts the Findings of the Court of the State Upon Matters of Fact as Conclusive, and is Confined to a Review of Questions of Federal Law Within the Jurisdiction Conferred Upon This Court.

*Water-Pierce Oil Co. v. Texas*, 212 U. S. 97.

*Quimby v. Boyd*, 128 U. S. 488.

*Egan v. Hart*, 165 U. S. 188.

*Dower v. Richards*, 151 U. S. 658.

*Thayer v. Spratt*, 189 U. S. 346.

*Missouri K. & T. R. Co. v. West*, 232 U. S. 682.

We are well aware of the holding of this court in *Northern Pacific Railway Company v. State of North Dakota* and *Minneapolis, St. Paul & Sault Ste. Marie Railway Company v. State of North Dakota*, 236 U. S. 585 and other cases that

"This court takes the facts as found by the state court as established unless

(1) A federal right has been denied as the result of a finding shown by the record to be unsupported by evidence or

(2) A conclusion of law as to a federal right and a finding of fact are so commingled as to make it necessary to analyze the latter."

But as said in that case neither of these conditions exist in this case. There is no conflict in the evidence in this case. There are here no controverted facts. Every word of the evidence is all one way. The evidence could support no other finding than the one made by this court.

In the recent case of *Missouri, K. & T. R. Co. v. West*, 232 U. S. 682, above cited, the syllabus is as follows:

"A decision of a state court having substantial support in the record that the pleadings and evidence in an action for death against an interstate railway company demonstrate that the deceased was in the employ of an express company rather than of the railway company, and that therefore the defendant's liability was not controlled by the federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), *involves no denial of any asserted federal right, and is not reviewable in the Federal Supreme Court.*

In the case cited whether the deceased was employed by the express company or by the railroad determined the question whether the case would have been tried under the federal law or the state law. This was an issue of fact. The trial court and the supreme court of Oklahoma found that he was employed by the express company and that therefore the state law applied. This court, under these circumstances, said in the above case:

"The state court, having decided, with substantial grounds for the decision, that the pleadings and evidence show an action under the employment by the express company, no denial of federal right is involved, and, therefore, motion to dismiss must be granted."

We say, as said by counsel in that case,

"It has never been held by this court that where the findings of fact of a state supreme court (in effect, denying the existence of a federal question, and hence the jurisdiction of this court) have any support in the record, under any reasonable construction of the pleadings and the evidence upon which the findings of fact are based, such findings can be questioned by this court by writ of error."

In the above case the evidence was extremely contradictory. The facts were controverted. While in the case at bar the petition states a case outside of interstate commerce; the answer states no facts showing that the deceased was engaged in interstate commerce; the evidence is undisputed and all one way that the deceased was engaged outside of interstate commerce; plaintiff in error at the trial conceded that the deceased was engaged outside of interstate commerce and tendered instructions asking that the case be submitted under

the state act; the trial court decided, under the undisputed evidence, that he was engaged outside of interstate commerce; the supreme court of Nebraska two times decided that under the undisputed evidence the deceased was engaged outside of interstate commerce, and in its first opinion said:

"It is probably true that if Mr. Wright was engaged in interstate commerce at the time he was killed the remedy would be under the federal act exclusively; but the trouble with this contention is neither Mr. Wright nor engine No. 1486 was at the time engaged in interstate commerce. His order was to take this engine from Fairbury, in Nebraska, to Albright, in Nebraska. He was running the engine without cars or train of any sort. The engine, so far as we can gather from the record, was defective, and was on its way to the car shops for repairs. In *Chicago & N. W. R. Co. v. United States*, 168 Fed. 236, 93 C. C. A. 450, 21 L. R. A. (N. S.) 690, the circuit court of appeals for this circuit held: 'The necessary movement of a defective empty car alone, for the purpose of repair only, and not in connection with any cars commercially used, does not subject the carrier to the penalties of the acts.' A similar holding was made by the same court in *United States v. Rio Grande W. R. Co.*, 174 Fed. 399, 98 C. C. A. 293. The same rule will, of course, apply to an engine."

We say that if under these circumstances a federal question is involved in this suit, and if under these circumstances this court has jurisdiction to re-examine all these matters, then in nearly every case a railroad can bring a suit from a state court to this court and have it again reviewed here. This court cannot be given jurisdiction through frivolous claims. There must be substance and merit to the assertion of federal rights or the writ must be dismissed.

#### IX.

**The Fact That Federal Questions Were Discussed in the Opinion of the State Court Gives no Right to Review Where no Claim Under the Constitution, Laws, or Treaties of the United States Was Presented to the Highest Court of the State.**

*Howard v. North Carolina*, 191 U. S. 126.

In the case at bar even no federal questions are discussed in the supreme court of Nebraska. All the supreme court does is to say that the deceased when he was killed was engaged outside of interstate commerce. This is not a discussion even of a federal question. Certainly it is not a denial of a federal right specially set up.

## X.

**A Decision of the State Court is not Reviewable in the Supreme Court on Writ of Error When it Decides no Federal Question.**

*Rogers v. Clark Iron Co.*, 217 U. S. 589.

*Santa Cruz Co. v. Santa Cruz R. R. Co.*, 111 U. S. 361.

*So. Ry. Co. v. Carson*, 194 U. S. 136.

## XI.

**The Mere Averment of a Federal Question Without Color of Ground Therefor is Insufficient to Give This Court Jurisdiction.**

*New Orleans v. Louisiana*, 185 U. S. 336.

*Deming v. Carlisle*, 226 U. S. 102.

*Consolidated Turnpike Co. v. Norfolk Ry. Co.*, 228 U. S. 596.

*Cornelius v. Phoenix*, 233 U. S. 593.

*Seaboard Air Line Railway v. Padgett*, decided March 22, 1915.

As said in last case above cited:

"The existence of jurisdiction to review under the principles just stated depends not merely upon form but upon substance; that is, in this class of cases, as in others, the general rule controls that power to review can not arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous."

In other words there must be substance to the claim and it must be asserted according to established rules of law.

## XII.

**It is Well Settled That a Real and not a Fictitious Question is Essential to the Jurisdiction of the Supreme Court Over the Judgments of the State Courts.**

*Hamlin v. Western Land Co.*, 147 U. S. 531.

*New Orleans Water Works v. Louisiana*, 185 U. S. 336.

*Patterson v. Colorado*, 205 U. S. 454.

*Sawyer v. Piper*, 189 U. S. 154.

*Wabash R. Co. v. Flannigan*, 198 U. S. 29.

## XIII.

**A Writ of Error Does not Carry the Whole Case and Every Question in it From a State Court to the United States Supreme Court. It Only Carries up for Decision the Federal Questions Mentioned in Section 709 of the Revised Statutes. The Supreme Court in Cases From the State Courts Has no Power to Determine any Other Questions or Matters.**

*Water-Pierce Oil Co. v. Texas*, 212 U. S. 86-97.

*Seaboard Airline Ry. v. Duval*, 225 U. S. 477.

## XIV.

**The Reason for This is That the Jurisdiction of the Supreme Court to Review the Proceedings of a State Court is not That of a General Reviewing Court in Error, but is Limited to the Specific Instances of Denials of Federal Rights Specially set up, Whether Those Pertaining to the Constitutionality of Federal or State Statutes or to Certain Rights, Titles, Immunities and Privileges of Federal Origin Specially set up in the State Court and Denied by the Rulings and Judgment of That Court.**

*Water-Pierce Oil Co. v. Texas*, 212 U. S. 86-97.

*Rogers v. Clark Iron Co.*, 217 U. S. 589.

*Western Union Telegraph Co. v. Wilson*, 213 U. S. 52.

*St. Louis I. M. & S. R. Co. v. Taylor*, 210 U. S. 281.

*Atchison, Topeka, etc., R. Co. v. Sowers*, 213 U. S. 55.  
*Central Land Co. v. Laidley*, 159 U. S. 103.  
*Turner v. Wilkes Co.*, 173 U. S. 461.

## XV.

Under Nebraska Practice (1) Where Instructions are Given at the Request of a Party He Cannot Predicate Error Thereon; nor (2) can He Complain of the Giving of Instructions in Harmony With Instructions Requested; nor (3) Will a Case in General be Reviewed in the Supreme Court Except Only on the Theory Adopted by the Parties in the District Court; and (4) Supreme Court on Error can Only Consider Such Points as Have Been Brought to the Attention of the District Court and Rulings Had Thereon, and It is Such Ruling or Refusal to Rule by the District Court Upon Which the Supreme Court Can Act.

## (1)

*Fremont E. & M. V. R. Co. v. Meeker*, 28 Neb. 94.  
*Dawson v. Williams*, 37 Neb. 1.  
*Jonasen v. Kennedy*, 39 Neb. 313.  
*Omaha Fair & Exposition Assoc. v. Mo. P. Ry.*, 42 Neb. 105.  
*City of Omaha v. Richards*, 49 Neb. 244.  
*Shiverick v. Gunning*, 58 Neb. 29.  
*Chicago, B. & Q. R. R. v. Troyer*, 70 Neb. 293.

## (2)

*American Fire Ins. Co. v. Landfare*, 56 Neb. 482.  
*Farmers Bank v. Garrow*, 63 Neb. 64.  
*Farmers Mutual Ins. Co. v. Cole*, 93 N. W. 730.

## (3)

*Wood v. Baird*, 43 Neb. 310.  
*Omaha Brewing Assoc. v. Wirethrick*, 47 Neb. 920.

## (4)

*C. St. P. M. & O. Ry. Co. v. Lundstrum*, 16 Neb. 254.  
*Omaha Fire Ins. Co. v. Dirks*, 43 Neb. 473.  
*Dayton Spice Mills Co. v. Sloan*, 49 Neb. 622.  
*Fullerton v. Cunningham*, 48 Neb. 857.

*Broadwater v. Foxworthy*, 57 Neb. 406.

*Bankers Life v. Robbins*, 59 Neb. 170.

*Batty v. City*, 69 Neb. 511.

No federal question was in any way hinted at in the proceedings had in the district court of the state. During the whole trial not the slightest suggestion was made by plaintiff in error that any federal question was involved. On the contrary plaintiff in error invoked the State Employer's Liability Act in the trial in the district court by tendering instructions under the state act. Under these authorities the supreme court of Nebraska could consider only such questions as were tendered to the trial court; and the supreme court of Nebraska did only this; the holding by the supreme court that the deceased when he was killed was engaged outside of interstate commerce under the undisputed evidence is simply a finding of a fact assumed by the trial court and demanded by plaintiff in error in the trial court. No federal right was specially set up and denied in any state court.

## XVI.

**If no Federal Question Was Properly Presented to or Decided by the State Court the Order of the Supreme Court is Regularly to Dismiss the Writ of Error for Want of Jurisdiction.**

*Water-Pierce Oil Co. v. Texas*, 212 U. S. 112.

*Los Angeles Milling Co. v. Los Angeles*, 217 U. S. 217.

*Telluride Power Co. v. Rio Grande R. R. Co.*, 175 U. S. 639.

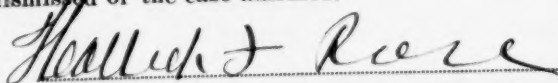
*Egan v. Hart*, 165 U. S. 188.

*Welloughby v. City of Chicago*, 235 U. S. 45.

*Cleveland and Pittsburg Railroad Co. v. City of Cleveland*, 235 U. S. 50.

We respectfully submit that the following propositions are true in this case: (1) that under the undisputed evidence the deceased at the time he was killed was not engaged in interstate commerce, and that therefore no federal question is involved and the state court properly submitted the case

under the state law; (2) that under this undisputed evidence the court's instructions declared that the deceased at the time he was killed was engaged outside of interstate commerce and the plaintiff in error having requested such instructions is bound by them, and that it must be taken as settled that the State Employers' Liability Act is applicable and not the Federal Act; (3) that this court under this record cannot review an issue of fact; (4) that the plaintiff in error in no court specially set up or claimed any federal right which was denied it by any state court; (5) that even though the deceased had been engaged in interstate commerce the plaintiff in error would have waived its right to assert such a claim under the record it has made in this case; and (6) that even though the deceased had been engaged in interstate commerce, still it would be error without prejudice because the position of the plaintiff in error was made no worse but better because the case was tried upon the hypothesis that the state law governed. This writ of error, therefore, must be dismissed or the case affirmed.



Omaha, Nebraska.

*Attorney and counsel for defendants in error.*

GEORGE W. BERGE,  
Lincoln, Nebraska,  
*Of Counsel.*

**APPENDIX.**

**PETITION FOR WRIT OF ERROR.**

**IN THE SUPREME COURT OF THE STATE OF  
NEBRASKA.**

LIZZIE L. WRIGHT AND HENRY C. BERGE, ADMINISTRATORS OF  
THE ESTATE OF OTTO O. WRIGHT, DECEASED, *Plaintiffs and*  
*Appellees,*

VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, A  
CORPORATION, *Defendant and Appellant.*

Comes now the above named Chicago, Rock Island & Pacific Railway Company, appellant, and says that on the 26th day of September, 1913, judgment in this case was entered by this court against the said Chicago, Rock Island & Pacific Railway Company, appellant, affirming a judgment in the district court of Lancaster county, Nebraska, and that thereafter a motion for a rehearing was filed, presented, considered, and on the 18th day of April, 1914, denied by this court, whereupon said judgment became final; that the said supreme court of the state of Nebraska is the highest court of said state in which a decision of this case could be had.

That the said Chicago, Rock Island & Pacific Railway Company was and is aggrieved in that in said judgment and proceedings had prior thereto in this case certain errors were committed to its prejudice. That in the said action rights, privileges and immunities were claimed by your petitioner under the constitution and statutes of the United States, and under authority exercised under the United States and the decision of the said supreme court of the state of Nebraska was against the rights, privileges and immunities especially set up and claimed under said constitution, statutes and authority, all of which will more fully appear in detail upon the assignments of errors filed herein.

Your petitioner further alleges and says that the judgment of the district court of Lancaster county, Nebraska, which has been affirmed and made final by the judgment of this court heretofore mentioned was against this appellant for the sum of \$15,000, and that said judgment of the district court of Lancaster county, Nebraska, was entered on the 22nd day of March, 1911.

Wherefore, the said Chicago, Rock Island and Pacific Railway Company prays that a writ of error may issue to the supreme court of the state of Nebraska for the correcting of the errors complained of and that a duly authenticated transcript of the record, proceedings, and papers herein may be sent to the United States supreme court.

And the said Chicago, Rock Island & Pacific Railway Company further prays for an order fixing the amount of bond for a supersedeas in said cause and that upon the giving of said bond all further proceedings in this court and in the district court of Lancaster county, Nebraska, may be suspended and stayed until the determination of such writ of error by the United States supreme court.

PAUL E. WALKER,

E. P. HOLMES,

G. L. DELACY,

*Attorneys for the Chicago, Rock  
Island and Pacific Railway  
Company.*

#### **ALLOWANCE OF WRIT.**

Comes now the Chicago, Rock Island & Pacific Railway Company, the appellant above named, on this 28th day of April, A. D. 1914, and files and presents to this court its petition praying for the allowance of a writ of error intended to be urged for it, and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the supreme court of the United States, and praying that an order be made

fixing the amount of security or bond which the appellant should give and furnish upon said writ of error, and that upon the giving of said bond all further proceedings of this court and of the district court of Lancaster county, Nebraska, be suspended and stayed until the determination of said writ of error by the said supreme court of the United States, and praying that such other and further proceedings may be had in the premises as may be just and proper; and it appearing that the Chicago, Rock Island & Pacific Railway Company has filed its assignment of errors, upon the consideration of the said petition and of the assignment of errors heretofore filed, this court desiring to give petitioner an opportunity to test in the supreme court of the United States the question therein presented, it is ordered by this court that a writ of error be allowed as prayed, and it is further ordered that upon said appellant, the Chicago, Rock Island & Pacific Railway Company, filing with the clerk of this court a good and sufficient bond in the sum of \$25,000, conditioned according to law, and conditioned that if the said Chicago, Rock Island & Pacific Railway Company shall prosecute the said writ of error to affect, and answer all damages and costs if it fail to make its plea good, then the said obligation to be null and void, else to remain in full force and virtue, and that all proceedings in this court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States supreme court, said bond to act as a supersedeas.

In testimony whereof, witness my hand this 28th day of April, A. D. 1914.

MANOAH B. REESE,

*Chief Justice of the Supreme  
Court of the State of Nebraska.*

UNITED STATES OF AMERICA.

*The President of the United States to the Honorable, the Justices of the Supreme Court of the State of Nebraska,  
Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme

court of the state of Nebraska, before you, on the 26th day of September, 1913, of the September term of the year 1913, thereof, being the highest court of law or equity of said state in which a decision could be had in said suit between the Chicago, Rock Island & Pacific Railway Company, a corporation, defendant and appellant, and Lizzie L. Wright and Henry C. Berge, administrators of the estate of Otto O. Wright, deceased, plaintiff and appellees, wherein rights, privileges and immunities are claimed under the constitution and statutes of the United States and under authority exercised under the United States, and the decision was against the rights, privileges and immunities especially set up and claimed under such constitution, statutes and authority, a manifest error has happened to the great damage of the said Chicago, Rock Island & Pacific Railway Company, a corporation, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given that then under your seal, distinctly and openly, you send the records and proceedings as aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same in the said supreme court at Washington, D. C., within thirty days from the date hereof, that the records and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error, or of right, and according to the laws and constitution of the United States should be done.

Witness, the Honorable Edward D. White, chief justice of the supreme court of the United States, this 28th day of April, A. D. 1914.

Done in the city of Lincoln, and county of Lancaster, with the seal of the district court of the United States for the district of Nebraska, Lincoln division, attached.

R. C. HOYT,

By J. H. McCLAY,

*Deputy Clerk of the District*

*Court of the United States for  
the District of Nebraska, Lin-  
coln Division.*

(Seal)

Allowed by MANOAH B. REESE.

**ASSIGNMENT OF ERRORS.**

IN THE SUPREME COURT OF THE STATE OF  
NEBRASKA.

LIZZIE L. WRIGHT AND HENRY C. BERGE, ADMINISTRATORS OF  
THE ESTATE OF OTTO O. WRIGHT, DECEASED, *Plaintiff and  
Appellee,*

VS.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, A  
CORPORATION, *Defendant and Appellant.*

The appellant in the above entitled case, the Chicago, Rock Island & Pacific Railway Company, in connection with its petition for a writ of error herein presents and files therewith its assignment of errors as to which matters and things it says that the decision and final judgment of the supreme court of the state of Nebraska entered herein on the 26th day of September, 1913, a motion for rehearing on the same being overruled on the 18th day of April, 1914, is erroneous, and avers and shows that in the record and proceedings in said cause, the supreme court of the state of Nebraska erred to the grievous injury and wrong of the said Chicago, Rock Island & Pacific Railway Company, and to the prejudice and against the rights of the said Chicago, Rock Island & Pacific Railway Company, appellant and plaintiff in error in the following particulars, to-wit:

1.

The said supreme court erred in holding that under the evidence and pleadings in the case that the Chicago, Rock Island & Pacific Railway Company was not entitled to have this case tried and submitted to the jury under the Federal Employer's Liability Act, being an act approved April 22, 1908, ch. 149, 35 Stat. L. 65.

## 2.

The said supreme court erred in holding that at the time of the collision, in which the deceased Otto O. Wright was killed for the death of whom this action was brought, the said Otto O. Wright was not employed or engaged in interstate commerce within the meaning of the Federal Employer's Liability Act, being an act approved April 22, 1908, ch. 149, 35 Stat. L. 65.

## 3.

The supreme court erred in holding that under the evidence in this case the said Otto O. Wright was not engaged and employed by the said Chicago, Rock Island & Pacific Railway Company in interstate commerce at the time of the collision which resulted in his death, within the meaning of the said act above mentioned.

## 4.

The supreme court erred in not reversing the judgment of the trial court for the reason that the said trial court erred in trying and submitting the case under the Employer's Liability Act of the state of Nebraska, being an act in effect July 5, 1907, page 192, Laws of Nebraska 1907, section 10592 of Cobbey's Annotated Statutes, and section 2803, Compiled Statutes of Nebraska for 1907, and in refusing to try and submit said case under an Act of Congress of April 22, 1908, 35 Stat. L. 65.

## 5.

The said supreme court erred in not reversing the judgment of the trial court for the reason that the said trial court erred in not sustaining the motions of the defendant to direct a verdict made at the close of the plaintiff's testimony and at the conclusion of the taking of testimony upon the following grounds: "1. That the evidence of the plaintiff is insufficient upon which to base a verdict against the defendant. 9. For the further reason that from the evidence of the plaintiff as a matter of law, plaintiff's action will not lie against the defendant company."

## 6.

The supreme court erred in not holding that the death of Otto Wright, for whose death this action is brought, was not caused or was not the result in whole or in part of any act or of any negligence of any of the officers, agents or employees of the plaintiff in error, and was not the result of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment, and hence no recovery could be had under the Act of Congress of April 22, 1908, 35 Stat. L. 65.

## 7.

The supreme court erred in not holding that under the evidence in the case the death of the said Otto O. Wright was the direct and proximate result of his own contributory negligence, and was not the result of any act of this plaintiff in error, and hence under section three of the act of April 22, 1908, no damage could be recovered, and no judgment should be sustained awarding damages against this plaintiff in error.

## 8.

The supreme court erred in not sustaining error No. 50 of the assignment of errors contained in the brief of the plaintiff in error, filed in this court in the above entitled case, the same being on page 7 of the said original brief, which is as follows:

"The court erred in submitting the cause to the jury upon the theory that a recovery was permissible under the Nebraska Employers' Liability Act, when the evidence disclosed that the decedent was running from Fairbury, in Nebraska, to Council Bluffs, in Iowa, and was engaged in interstate commerce at the time of his injury and the said cause should have been tried under the Federal Employers' Liability Act."

## 8.

The supreme court erred in sustaining the judgment of the trial court and in entering judgment against the appellant, the Chicago, Rock Island & Pacific Railway Company.

## 9.

The supreme court erred in not reversing the judgment of the lower court for the reason that the lower court erred in submitting the question as to whether or not the rules promulgated and enforced by this plaintiff in error were reasonably sufficient for the reason that under the Acts of Congress of April 22, 1908, 35 Stat. 65, no recovery could be had based on said alleged grounds of negligence.

## 10.

The supreme court erred in holding that a lone engine running from Fairbury, Nebraska, to Council Bluffs, Iowa, on the lines of this plaintiff in error, the engineer running under orders from Fairbury to Albright, Nebraska, was not engaged in interstate commerce so as to necessitate the trying of said case under an act of congress of April 22, 1908, 35 Stat. L. 65.

## 11.

The supreme court erred in sustaining the judgment of the trial court for the reason that under the evidence in this case no acts of negligence was shown on the part of this plaintiff in error or its agents and employees, or officers, such as would entitle a recovery under the act of April 22, 1908, 35 Stat. L. 65.

## 12.

The supreme court erred in affirming the judgment of the trial court and in entering judgment against this appellant under the Nebraska Employer's Liability Act, for the reason that the said act was superseded by an act of Congress of April 22, 1908, 35 Stat. L. 65, and that said judgment amounts to the taking of property without due process of law in violation of section one, article fourteen of the constitution of the United States.

*Wherefore*, for these and other manifest errors appearing in the record the said Chicago, Rock Island & Pacific Railway Company, plaintiffs in error, prays that the said decision and final judgment of the supreme court of the state of Nebraska, may be reversed and set aside and held for naught, and that

judgment may be rendered for plaintiff in error, granting it its rights under the statutes and laws of the United States, and plaintiff in error also prays judgment for its costs.

PAUL E. WALKER,

HOLMES & DELACY,

*Attorneys for Appellant, the Chicago, Rock Island & Pacific Railway Company, a Corporation.*

### PETITION.

#### IN THE SUPREME COURT OF THE STATE OF NEBRASKA.

LIZZIE L. WRIGHT AND HENRY C. BERGE, ADMINISTRATORS OF THE ESTATE OF OTTO O. WRIGHT, DECEASED, *Plaintiffs.*

VS.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, A CORPORATION, *Defendant.*

For cause of action against the defendant, plaintiff avers:

1. That on the 9th day of December, 1909, Otto O. Wright, died intestate in Lincoln, Lancaster county, Nebraska, having in said county an estate to be administered upon; that on the 20th day of May, 1910, the plaintiffs were duly appointed, by the county court of Lancaster county, Nebraska, administrators of said estate; that they have qualified as such administrators and are now acting as such.

2. That the plaintiff Lizzie L. Wright, is a resident and citizen of the city of Denver and state of Colorado, and at the time of the filing of this petition is a resident and citizen of the city of Denver and state of Colorado; that the plaintiff Henry C. Berge is a resident and citizen of the city of Lincoln, Lancaster county, Nebraska, and at the time of the filing of this petition is a resident and citizen of the city of Lincoln, Lancaster county, Nebraska.

3. That the defendant, Chicago, Rock Island & Pacific Railway Company is a corporation and citizen of the state of Illinois and at the time of the filing of this petition is a citizen of the state of Illinois.

4. That the defendant during all the times hereinafter mentioned owned and operated a line of railroad through the state of Nebraska and was doing business as a common carrier of freight and passengers in said state and as such common carrier owned and maintained roadbeds, right of ways, tracks, engines, tenders, and cars, and employed engineers, firemen, brakemen, flagmen, switchmen and trainmen of every kind, to operate and control the movements of its trains, engines and switch engines, and maintained depots and train dispatchers, and generally owned property and employed men to conduct its railroad business in the state of Nebraska.

5. That at the time and for several years prior to the time of the commission of the wrong and injuries herein complained of, said deceased Otto O. Wright was employed by the defendant as a locomotive engineer upon its lines of railroad; *that on or about the 9th day of December, 1909, the deceased Otto O. Wright was sent with an engine of the defendant from Fairbury, Nebraska, to Omaha, Nebraska, for the purpose of taking said engine to a repair shop for repairs, and while taking said engine where he has been directed by the defendant and while on his way and on the 9th day of December, 1909, the defendant, through its servants, agents and employees, carelessly and negligently ran another engine, being a switch engine, violently against and into the engine that plaintiff's intestate was running, whereby plaintiff's intestate was caught between the cab and tender of his engine, pinioned beneath the wreckage of his engine, and subjected to injuries that resulted almost immediately in his death; that after the collision the defendant, instead of removing plaintiff's intestate, who was still alive, from the wreck, carelessly and negligently allowed him to remain there, and negligently permitted forty-five (45) minutes to elapse before extricating him from the wreck; that said collision and injury occurred on the defendant's*

track and right of way near Nineteenth and Holdrege streets in the city of Lincoln, Nebraska, at a point about one hundred (100) feet north of where the track of the defendant runs underneath an overhead bridge, known as the Holdrege street bridge; that the defendant's track makes an abrupt curve both south of, under and north of the bridge, for a considerable distance, and that about two hundred (200) feet north and east of the bridge aforesaid and about fifty (50) feet north of where the two engines collided, the track makes an abrupt turn north and east, and said curve runs through a deep cut at said point, and the defendant negligently constructed said cut in such narrow manner making it impossible for an engineer going north under the bridge to see an engine coming south just before said engine emerges from behind the acute portion of the cut aforesaid; that the danger at this point is augmented by the fact that the curve for a considerable distance south of, and for a short distance north of, the overhead bridge aforesaid, is comparatively gradual and open, giving one advancing from the south in a northerly direction, the impression that no train or engine can approach from the opposite direction without its approach being apprehended and seen for a long distance ahead; that the danger is further increased by the fact that the curve both under the bridge and for a considerable distance north and east thereof runs through a deep cut that is heightened by the abutments that support the overhead bridge.

6. That the collision and injury aforesaid occurred wholly without fault or negligence on the part of the plaintiff's intestate but did occur because of the negligence of the defendant; that the injuries and death of plaintiffs' intestate were caused and are the proximate result of the negligence of the defendant as hereinafter alleged; that said intestate had never been over this portion of defendant's track and that he was entirely unacquainted therewith and that defendant gave him no information whatever in respect to peculiar, great and unusual danger in going around said curve; that plaintiff had full and complete running orders over the track that he was running on at the time he was killed, and that he had his engine under

perfect control and that he was running, at the time of the injury complained of, in strict compliance with the orders of the defendant.

7. That said Otto O. Wright was killed on account of the negligence of the defendant which plaintiffs aver is as follows:

(a) The defendant was negligent and careless in the construction of its road bed and right of way where the injury complained of was inflicted in that said roadbed not only lies in a deep cut under an overhead wagon road bridge, known as the Holdrege street bridge, but it also makes an abrupt turn in this same cut aforesaid, just north of its bridge aforesaid making it utterly impossible for engineers or trainmen on engines or trains, approaching on both sides of said turn from opposite directions to see each other until it is too late to avert a collision; that the defendant was negligent in constructing its said roadbed with such an acute curve in said cut and that the defendant was negligent in excavating said cut in this: that said cut is too narrow and should have been made wider so that engineers approaching each other could see each other when still far enough apart, while running their engines under control, to stop and avert a collision; that said curve and cut at the place where plaintiff's intestate was killed is so constructed that two engineers running toward each other and both under control, cannot stop and avert a collision, after seeing each other.

(b) The defendant was negligent in failing to provide suitable automatic or other safeguards or signals to warn approaching trainmen of the danger and of the presence behind the curve and in the cut aforesaid, of other trains upon the same track; and especially in failing to provide the block system and semaphore which is a device and system generally recognized by experienced railroad men as efficient and adequate to prevent accidents and collisions at such points and which are in general and common use at the present time on well regulated railroads at dangerous places such as where plaintiff's intestate was killed; and especially in failing to

provide a gong, which is very inexpensive and which would have been a warning to plaintiff's intestate of the presence of defendant's other engine coming southward and which would have prevented the accident and injury; that said cut and curve was such a place of unusual, extraordinary and great danger other persons having been killed at the same place, of which the defendant had notice, and well knowing the dangerous character of said curve and cut, making it obligatory upon the defendant to take some precautionary measure to prevent further accidents and injury, and the death of plaintiffs' intestate.

(c) The defendant was negligent in failing to station a flagman at the place aforesaid where the collision occurred to warn plaintiffs' intestate and other approaching trains of impending danger, because said curve and cut were places of such unusual and great danger, which was known to defendant, as to make it obligatory upon the defendant to take some precautionary measure to prevent injuries just such as the injury to plaintiffs' intestate.

(d) The defendant was negligent and careless in failing to adopt a safe and effective system of operating its railway trains and one reasonably calculated to protect the life and limb of its servants and employees in this: in failing to promulgate suitable rules for the safety of its employees in the conduct of its business, the operation of its trains, the management of its yards in the city of Lincoln, Nebraska, and especially in failing to provide suitable rules for the operation in and near said yards, providing that said switch engines shall be bound to watch not only for first class trains, but also for all trains operated under special running orders and to clear the track for the same, instead of providing as said defendant does in its rules promulgated and enforced, that said switch engines are bound only to watch for first class trains and for passenger trains and as for all other trains, need only run under control; the defendant was negligent in giving the deceased, Otto O. Wright, the running orders from Lincoln to Havelock, as was the case, without notifying said Otto O.

Wright that said track was occupied by any other engine, and without notifying said other switch engine that said Otto O. Wright had orders over said road at said time; the defendant was negligent in not having rules that provided that its switch engine within the yard limits, coming around said curve, should always sound its whistle and ring its bell which was not done in this case, and for which the defendant has no rule; the defendant was negligent in not having a rule that one of its brakemen on its switch engine should ride on the front foot board of said engine and in that way be better enabled to discover approaching trains from the other direction.

(e) The defendant was negligent in failing to give said Otto O. Wright timely warning through its servants and employees, the engineer and fireman of the switch engine aforesaid by bell or whistle, of the approach upon the same track of said switch engine; that the defendant was negligent in not having one of its switchmen on said switch engine stationed on the foot board of said switch engine, coming around the curve, enabling the defendant to discover the engine of plaintiff's intestate in time to stop the same and prevent the collision and injury to plaintiffs' intestate.

(f) The defendant was negligent in failing to fasten securely in readily accessible place on intestate's engine and on said switch engine, emergency tools such as jacks, etc., whereby said intestate could have been extricated from underneath the wreckage where he was pinioned, without delay, and in failing and neglecting, through its servants, agents and employees, to locate and use the jacks and other tools that were actually on or about said engine instead of waiting to send down to the south yards in the city of Lincoln, Nebraska.

(g) The defendant was negligent in failing to apprise and inform plaintiffs' intestate of the dangerous character of the curve and cut aforesaid.

(h) The defendant was negligent in failing to install the block system and semaphore at the place of the injury aforesaid, or at least to have a gong at said place or a flagman

stationed thereat, after it received notice of the dangerous character of said place and curve by the death of one Disher who was killed at said same place only about a year prior to the injury causing the death of plaintiffs' intestate and after it had notice of another collision which occurred at said place about a year prior to the death of plaintiffs' intestate.

(i) The defendant was negligent in not providing for plaintiffs' intestate a safe place in which to work, but negligently gave him running orders from Lincoln to Havelock over and upon said track and around said curve, when as a matter of fact there was another engine on said track which was known to the defendant and unknown to plaintiffs' intestate.

(j) When said collision occurred and when plaintiff's intestate was killed plaintiff's intestate had his engine under proper control and immediately upon the discovery of said switch engine upon said track, plaintiffs' intestate reversed his engine and did all within his power to stop the same and that the collision of said engine and the death of plaintiff's intestate would have been averted except for the fact that the defendant's agents and employees upon said switch engine, as soon as they discovered the engine of plaintiff's intestate, jumped from their said engine without reversing the same and without trying to stop the same, and that on account of said negligence, caused said injury and the death of plaintiff's intestate; that if the engineer and fireman upon said switch engine had stayed with their said engine and reversed the same and tried to stop the same, as plaintiff's intestate did that both of said engines would have been brought to a standstill without a collision and the life of plaintiff's intestate saved; that the death of plaintiffs' intestate was caused by the negligence of said engineer and fireman on said switch engine in not reversing their said engine and stopping the same upon the discovery of the engine by plaintiffs' intestate.

(k) The defendant was negligent in this: After the engineer and fireman on said switch engine discovered the peril-

ous situation of plaintiffs' intestate on said engine and railroad track, they failed to exercise reasonable care to avoid injury to him, but without reversing their engine, jumped from their said engine and allowed the same at a dangerous and reckless rate of speed to run into plaintiffs' intestate and kill him; that such negligence was willful and the injury to plaintiff's intestate might have been averted except for the wilful and wanton negligence of defendant's servants and agents.

(1) That the defendant was negligent in running its said switch engine around said curve at a negligent, reckless and dangerous rate of speed and without having the same under control.

8. That at the time of his death, the said Otto O. Wright was thirty-two (32) years of age and prior to said injury was in good robust health and able to earn and did earn one hundred fifty (\$150) dollars per month which he devoted to the support and maintenance of his family, consisting of his wife, one of the plaintiffs, Lizzie L. Wright.

9. That by reason of the negligence of the defendant as hereinbefore alleged, causing the death of said Otto O. Wright, said widow and said estate has been damaged in the sum of twenty-five thousand dollars (\$25,000).

Wherefore plaintiffs pray for judgment against said defendant in the sum of twenty-five thousand dollars (\$25,000) together with costs of suit.

#### **AMENDED ANSWER OF THE DEFENDANT.**

Comes now the defendant, the Chicago, Rock Island & Pacific Railway Company, and for answer to plaintiffs' petition alleges and says:

The defendant denies each and every allegation in plaintiffs' petition contained.

## II.

The defendant for further answer alleges the fact to be, that the injury, if any, received by plaintiffs' decedent on the 9th day of December, 1909, was not caused by or the result of, or in any manner attributable to any negligence or carelessness of this defendant company, or any of its servants, agents or employees, on the other hand, the defendant company alleges that the injury was caused by and was the direct result of the carelessness and gross negligence of plaintiffs' decedent and that said gross negligence of said Otto O. Wright was in the following particulars to-wit:

That the point at which the accident alleged in plaintiffs' petition occurred, is within the yard limits of the defendant company in the city of Lincoln, Nebraska; that the defendant company had in force at said time and had promulgated a set of rules and time tables governing the operation and running of engines, such as the said Otto O. Wright was running, and governing enginemen, which rules and time tables provide among other things:

## Rule A:

"Employees whose duties are prescribed by these rules must provide themselves with a copy."

## Rule B:

"Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning they must apply to proper authority for an explanation."

## Rule D:

"Persons employed in any service on trains are subject to the rules and special instructions."

## Rule 97a:

"Yard limits will be indicated by yard limit boards."

"Within these limits yard engines may occupy main tracks, protecting themselves against over-due trains. Extra trains must protect themselves within the yard limits."

## Rule 106:

"In all cases of doubt or uncertainty the safe course must be taken and no risks run."

**Rule 718:**

"The engine man must have a reliable watch; a copy of the Time Table and a full set of signals; examine the General Order Board before each trip."

Rule 16 of Time Table 11-D, which was the time table issued by the defendant company and in force at the time of the accident referred to in plaintiffs' petition, which governed the operation of its trains by its engineers operating trains in the state of Nebraska, provided:

"All except first class trains will approach (enter and pass through the following named yards under full control) expecting to find main track occupied or obstructed:

Albright

Lincoln

Jansen

Fairbury

Belleville

Phillipsburg."

The defendant alleges that said Otto O. Wright was an able and experienced engineman and engineer, and was familiar with all the rules governing the running and operation of trains, and governing engineers, issued and promulgated by this defendant company in force at the time of the accident in which he met his death, and was familiar with the yard limits of said company in the city of Lincoln. But notwithstanding said rules, the plaintiffs' decedent did not run his engine under full control in the yard limits of the city of Lincoln as by rule required, and was not running and did not have his engine under control at the time of his injury, but was carelessly and negligently running his engine, which the defendant alleges was not a first class train but an extra train, at an excessive and negligent rate of speed, and not under full control within the Lincoln yard limits, and carelessly and negligently disobeyed said rules, which disobedience and which carelessness and negligence was gross negligence, and was the proximate cause of decedent's death, for all of which this defendant is nowise liable.

**III.**

Further answering, the defendant alleges that the wrong and injury, if any, complained of in plaintiffs' petition resulted

from the risks incident to the employment of plaintiffs' decedent; that the acts, conditions, dangers and risks which the plaintiffs allege caused the death of said Otto O. Wright, were obvious to him and he had full knowledge thereof; and the defendant alleges that plaintiffs' decedent assumed said risks and the dangers resulting therefrom. That plaintiffs' decedent assumed all the ordinary risks incident to the business in which he was engaged and especially all the risks, dangers and defects alleged in plaintiffs' petition and the defendant alleges that the injury which the said Otto Wright sustained resulted from risks that were incident to his employment and were assumed by him when he accepted the employment in which he was engaged at the time of the alleged injury for all of which the defendant is nowise liable.

#### IV.

The defendant further alleges that the risks resulting from the presence of the curve and the cut at Holdrege street, and from the presence of the viaduct and high embankment, which the plaintiffs allege obstructed the view, of the risks resulting from the lack of gongs, signals, automatic devices and semaphores at said curve, and from the absence of a flagman at said curve, as alleged in plaintiffs' petition, were obvious to plaintiffs' decedent, and were well known to him, and were assumed by him. Further, that the risks resulting from the running of a switch engine within the yard limits and upon the defendant's tracks, and the risks resulting from the presence of switch engines on said tracks, were incident to the employment of plaintiffs' decedent and were known to him and were assumed by him, and for an injury resulting from such risks, this defendant is nowise liable.

#### V.

The defendant further answering, alleges that it owns and operates a steam railway system running through Nebraska, Iowa, and Illinois, and other states, and is engaged in commerce between the several states, and that at the time of the injury complained of in plaintiffs' petition, the said engine

was being taken, and the said Otto O. Wright, was taking the same from Fairbury, Nebraska, to Silvis, Illinois, and that at the time of his injury and death, the said Otto O. Wright, was employed by this defendant in interstate commerce, and was engaged in interstate commerce, and that this court by reason thereof is without jurisdiction of the subject matter of this suit.

*Wherefore*, the defendant prays that judgment may be for it and that plaintiffs' cause of action be dismissed, and for judgment for costs.

### **REPLY OF PLAINTIFFS.**

Comes now the plaintiffs and for their reply to the defendant's amended answer deny each and every allegation therein contained inconsistent with the averments of plaintiffs' petition.

### **THE EVIDENCE IN THE RECORD THAT PLAINTIFFS' INTESTATE AT THE TIME HE WAS KILLED WAS NOT ENGAGED IN INTERSTATE COMMERCE.**

Exhibit "11," stripped of everything except what is material is as follows:

*"Engine 1486 will run extra Fairbury to Albright."*

The above order is the train order delivered to the deceased and as the evidence later will show both of these points are within the state of Nebraska.

WILLIAM C. CAVANAUGH, chief train dispatcher for the defendant, and residing at Fairbury, and testifying concerning Exhibit "9" in the record, which is the time table, says:

Q. 413. Trains on your system between Fairbury and Albright or South Omaha were operated under that time table? A. Yes, between Fairbury and Albright.

Q. 414. Between Fairbury and Albright? A. Yes, sir.

Q. 572. What was the purpose of taking that engine up there? Do you know? A. It was on her way to the shop.

Q. 573. Do you know of your own knowledge whether he had a full train crew with him? A. He had all that the law requires and what we run all light engines with, an engineer and fireman and a flagman.

Q. 577. This engine No. 1486? A. Yes, sir.

Q. 578. A light engine or heavy? A. A light engine.

Q. 579. Do you know that of your own knowledge? A. Yes. Pardon me, I don't know what you mean between a light and a heavy engine.

Q. 580. I was going to ask you. A. What we call a light engine is an engine going without any cars, not the size of the engine.

Q. 618. I will ask you another question. I will ask you whether Exhibits 15 and 14 originated in your office and had to do with the running orders of Wright from Fairbury to Albright? A. Yes.

Q. 629. When he got his train order at Fairbury in the morning, say to run to Albright, that was his order, wasn't it? He had a right to go to Albright? A. Yes, sir.

Q. 683. Now the running order of Mr. Wright from Fairbury to Albright, what kind of an order do you call that? A. 31 order.

E. E. McLANE, who was fireman on deceased's engine at the time he was killed, testified as follows:

Q. 3439. State what kind of a train that was that day that you and Mr. Wright was on. A. We had no train whatever, just a lone engine.

Q. 3440. Do you remember now the number of the engine? A. Yes, sir.

Q. 3441. What was the number? A. 1486.

Q. 3494. I wish you would state whether this engine was a large engine or a small engine. A. It was a pretty large engine.

Q. 3495. Well, state whether it was a freight engine. A. It was a freight engine.

Q. 3835. Do you know why you were going from Fairbury to Council Bluffs with a lone engine that day?

A. 3836. What for?

Q. 3827. Taking it up for repairs? A. Yes, sir.

L. H. HINITT, who was brakeman on the engine when deceased was killed, testified:

Q. 4121. What kind of a train were you running that day, did you have a train or just an engine. A. Do you mean to specify the class of train?

Q. 4122. No, any cars? A. A light engine.

Q. 4123. Did you have anything but an engine and coal car. A. No, very light engine; tank and engine is a light engine.

Q. 4124. The engine takes in coal car and tank? A. Yes, sir.

Q. 4125. What were you that day, brakeman, flagman or what? A. I was called flagman, but it is all the same in our terms.

Q. 4126. That is a flagman and a brakeman is the same? A. Yes, sir.

Q. 4368. Do you know of your own knowledge where you were going and what for? A. Do I know of my own knowledge where I was going and what for?

Q. 4369. What was the purpose you were going to Council Bluffs with this engine? A. Well, I can't say only from hearsay. The engine was going to the shops.

Q. 4370. For repairs? A. For repairs.

**INSTRUCTIONS TENDERED BY PLAINTIFF IN ERROR ON  
THE THEORY THAT DECEASED WAS NOT  
ENGAGED IN INTERSTATE COMMERCE.**

**Instruction No. 10.**

You are instructed that if you find from the evidence that defendant was guilty of negligence which was the proximate cause of the death of plaintiff, and if you find also that plaintiffs' intestate was guilty of negligence which contributed to his death, then the plaintiffs cannot recover in this action unless the defendant was guilty of gross negligence and the deceased's

negligence was slight as compared with that of the defendant. Also if you find that defendant's negligence was equal to plaintiffs' intestate's negligence, or was not greater than the negligence of plaintiffs' intestate, then the plaintiffs cannot recover.

**Instruction No. 11.**

And by gross negligence is meant the want of that care which every man of common sense, however inattentive he may be, takes of his own safety; and negligence cannot be considered gross unless evidenced by an entire failure to exercise of such slight degree of care as to justify a belief that the person on whom the care was incumbent was indifferent to the safety and welfare of the others and of himself.

And by slight negligence is meant the omission of that vigilance which persons of extraordinary prudence and foresight are accustomed to use, or it may be defined as the failure to exercise great care and diligence.

**Instruction No. 25.**

You are further instructed that in the event that you find that the defendant was guilty of negligence which was gross and that the deceased was guilty of negligence which was slight in comparison therewith, then you are instructed that in assessing the damages the damages shall be diminished by you in proportion to the amount of negligence attributable to the deceased bears to that of the defendant.

**INSTRUCTIONS GIVEN BY THE COURT ON THE THEORY  
THAT DECEASED WAS NOT EMPLOYED IN INTER-  
STATE COMMERCE AND AS REQUESTED BY  
PLAINTIFF IN ERROR.**

**Instruction No. 11.**

If you find from the evidence that the defendant was negligent in one or more of the particulars alleged, and as set out in the first paragraph of these instructions, and if you further find from the evidence that such negligence proximately con-

tributed to the injury of plaintiffs' intestate, then you should direct your attention among other things to the defendant's claim that plaintiffs' intestate was negligent and also that he assumed the risks of his employment.

**Instruction No. 12.**

As to the defendant's claim that plaintiffs' intestate was negligent, and that said negligence proximately contributed to his injury, you are instructed that the fact that Otto O. Wright has been guilty of contributory negligence, if you so find, does not bar a recovery herein; if you further find from the evidence that his negligence was slight, and that of the defendant was gross in comparison; but you are instructed that in assessing the plaintiffs' damages, if any you find, such damages shall be diminished by you in proportion as the amount of negligence attributable to the said Wright bears to that of the defendant.

By gross negligence is meant the want of that care which every man of common sense, however inattentive he may be, takes of his own safety; and negligence can not be considered gross, unless evidenced by an entire failure to exercise care or by the exercise of such slight degree of care as to justify a belief that the person on whom the care was incumbent was indifferent to the welfare of others and of himself.

By a slight negligence is meant the omission of that vigilance which persons of ordinary prudence and foresight are accustomed to use, or it may be defined as the failure to use great care and diligence.

**Instruction No. 15.**

The laws of Nebraska, which grant the right to plaintiffs to maintain this kind of an action, restricts the recovery of damages solely to the pecuniary loss sustained by Lizzie L. Wright, the widow of Otto O. Wright. The law simply provides that only such damages shall be awarded as in the impartial and considerate judgment of the jury shall be a fair and just compensation to said widow for the pecuniary

or money loss sustained by the death of her husband. You may take into consideration the age of said Otto O. Wright at the time of his death, his earning capacity prior to such death, and his ability and disposition to contribute out of his earnings to his wife's support; his physical condition and his probable expectancy of life, and you will then return your verdict for such amount as will in your judgment recompense the widow for the pecuniary loss sustained by her.

However, in the event that you find from the evidence that said Otto O. Wright was guilty of contributory negligence which was slight, while the negligence of the defendant was gross, then in assessing plaintiffs' damages such damages shall be diminished by you in proportion as the amount of negligence attributable to Otto O. Wright bears to that of the defendant.

On the other hand, should you find for the defendant you will so say by your verdict.

#### **THE NEBRASKA EMPLOYERS LIABILITY ACT.**

*"Be it Enacted by the Legislature of the State of Nebraska:*

"Section 1. (Railway company's liability to injured employee.)—That every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, or, in the case of his death, to his personal representatives, for the benefit of his widow and children, if any; if none, then to his parents; if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents, or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

"Section 2. (Same; contributory negligence.)—That in all actions hereafter brought against any railway company to recover damages for personal injuries to an employee, or

when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, all questions of negligence and contributory negligence shall be for the jury.

"Approved March 11, 1907."  
*Secs 6053-6054 Revised Veb Statute 1913.*

### **FEDERAL EMPLOYERS' LIABILITY ACT.**

Section 1. (Liability of railroads for injuries to employees.) That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 3. (Contributory negligence of employee.) That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee

who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

### VERDICT OF THE JURY.

"We, the jury, duly empaneled and sworn in the above entitled cause, do find for the plaintiffs and assess the amount of their damages against the defendant at the sum of \$25,000.00.

C. M. HERRICK, *Foreman.*"

Judgment was duly rendered upon this verdict.

### DEFENDANT'S MOTION FOR NEW TRIAL.

Comes now the defendant, the Chicago, Rock Island & Pacific Railway Company, and moves the court to set aside the verdict heretofore returned by the jury on the 23rd day of March, 1911, and for a new trial of this cause, for the following reasons, to-wit:

1

The verdict is not sustained by sufficient evidence.

2

The verdict is contrary to the weight of the evidence.

3

The verdict is contrary to law.

4

Errors of law occurring at the trial, duly excepted to by the defendant.

5

The court erred in overruling the defendant's motion to direct a verdict in favor of the defendant, and against the plaintiffs, at the conclusion of the plaintiffs' case.

6

The court erred in refusing to admit evidence on behalf of the defendant, and the offer thereof duly excepted to.

## 7

The court erred in overruling the defendant's motion to direct a verdict in favor of the defendant and against the plaintiffs at the conclusion of the trial of said cause, for the reason therein given, to which the defendant duly excepted.

## 8

The court erred in refusing to give to the jury instruction No. 1 requested by the defendant, to which the defendant duly excepted.

## 9

The court erred in refusing to give to the jury instruction No. 2 requested by the defendant, to which the defendant duly excepted.

## 10

The court erred in refusing to give to the jury instruction No. 3 requested by the defendant, to which the defendant duly excepted.

## 11

The court erred in refusing to give to the jury instruction No. 4 requested by the defendant, to which the defendant duly excepted.

## 12

The court erred in refusing to give to the jury instruction No. 5 requested by the defendant, to which the defendant duly excepted.

## 13

The court erred in refusing to give to the jury instruction No. 6 requested by the defendant, to which the defendant duly excepted.

## 14

The court erred in refusing to give to the jury instruction No. 7 requested by the defendant, to which the defendant duly excepted.

15

The court erred in refusing to give to the jury instruction No. 8 requested by the defendant, to which the defendant duly excepted.

16

The court erred in refusing to give to the jury instruction No. 9 requested by the defendant, to which the defendant duly excepted.

17

The court erred in refusing to give to the jury instruction No. 10 requested by the defendant, to which the defendant duly excepted.

18

The court erred in refusing to give to the jury instruction No. 11 requested by the defendant, to which the defendant duly excepted.

19

The court erred in refusing to give to the jury instruction No. 12 requested by the defendant, to which the defendant duly excepted.

20

The court erred in refusing to give to the jury instruction No. 13 requested by the defendant, to which the defendant duly excepted.

21

The court erred in refusing to give to the jury instruction No. 14 requested by the defendant, to which the defendant duly excepted.

22

The court erred in refusing to give to the jury instruction No. 15 requested by the defendant, to which the defendant duly excepted.

## 23

The court erred in refusing to give to the jury instruction No. 16 requested by the defendant, to which the defendant duly excepted.

## 24

The court erred in refusing to give to the jury instruction No. 17 requested by the defendant, to which the defendant duly excepted.

## 25

The court erred in refusing to give to the jury instruction No. 18 requested by the defendant, to which the defendant duly excepted.

## 26

The court erred in refusing to give to the jury instruction No. 19 requested by the defendant, to which the defendant duly excepted.

## 27

The court erred in refusing to give to the jury instruction No. 20 requested by the defendant, to which the defendant duly excepted.

## 28

The court erred in refusing to give to the jury instruction No. 21 requested by the defendant, to which the defendant duly excepted.

## 29

The court erred in refusing to give to the jury instruction No. 22 requested by the defendant, to which the defendant duly excepted.

## 30

The court erred in refusing to give to the jury instruction No. 23 requested by the defendant, to which the defendant duly excepted.

## 31

The court erred in refusing to give to the jury instruction No. 24 requested by the defendant, to which the defendant duly excepted.

## 32

The court erred in refusing to give to the jury instruction No. 24 requested by the defendant, to which the defendant duly excepted.

## 33

The court erred in giving to the jury instruction No. 1 given upon the court's own motion, to which the defendant duly excepted.

## 34

The court erred in giving to the jury instruction No. 2 given upon the court's own motion, to which the defendant duly excepted.

## 35

The court erred in giving to the jury instruction No. 3 given upon the court's own motion, to which the defendant duly excepted.

## 36

The court erred in giving to the jury instruction No. 4 given upon the court's own motion, to which the defendant duly excepted.

## 37

The court erred in giving to the jury instruction No. 5 given upon the court's own motion, to which the defendant duly excepted.

## 38

The court erred in giving to the jury instruction No. 6 given upon the court's own motion, to which the defendant duly excepted.

39

The court erred in giving to the jury instruction No. 7 given upon the court's own motion, to which the defendant duly excepted.

40

The court erred in giving to the jury instruction No. 8 given upon the court's own motion, to which the defendant duly excepted.

41

The court erred in giving to the jury instruction No. 9 given upon the court's own motion, to which the defendant duly excepted.

42

The court erred in giving to the jury instruction No. 10 given upon the court's own motion, to which the defendant duly excepted.

43

The court erred in giving to the jury instruction No. 11 given upon the court's own motion, to which the defendant duly excepted.

44

The court erred in giving to the jury instruction No. 12 given upon the court's own motion, to which the defendant duly excepted.

45

The court erred in giving to the jury instruction No. 13 given upon the court's own motion, to which the defendant duly excepted.

46

The court erred in giving to the jury instruction No. 14 given upon the court's own motion, to which the defendant duly excepted.

47

The court erred in giving to the jury instruction No. 15 given upon the court's own motion, to which the defendant duly excepted.

48

The court erred in giving to the jury instruction No. 16 given upon the court's own motion, to which the defendant duly excepted.

49

The court erred in giving to the jury instruction No. 17 given upon the court's own motion, to which the defendant duly excepted.

50

The court erred in directing a verdict for the plaintiffs in the 15th paragraph of its instructions.

51

The damages are excessive, and were given under the influence of passion and prejudice.

52

The court erred in refusing the request for instruction No. 5 requested by defendant, in reference to accidents happening at the place complained of in this case, to which the defendant duly excepted.

53

The court erred in submitting paragraphs (a), (b), (c) and (d) of its first instruction, submitting to the jury the several acts of negligence therein set forth, for the reason that there was no evidence offered to the jury in support thereof.

Respectfully submitted.

**RULING ON MOTION FOR NEW TRIAL BY THE TRIAL COURT.**

This cause now comes on to be heard upon the motion of the defendant to set aside the verdict of the jury heretofore

returned and entered herein and the judgment rendered thereon, and for a new trial of this cause, and is submitted to the court, on due consideration whereof it is by the court ordered that if plaintiffs herein within ten days from this date file a remittitur of \$10,000.00 from the verdict heretofore rendered herein, letting the said verdict stand for \$15,000.00, then the said motion for a new trial is overruled, otherwise the said motion is sustained, to all of which each party hereto severally excepts, and hereby are each allowed forty days from the adjournment of this term of court to reduce exceptions to writing.

#### **REMITTITUR.**

Come now the plaintiffs in the above action and hereby remit from the verdict and judgment in the above entitled cause, the sum of \$10,000 from the verdict and judgment rendered herein, letting said verdict stand for the sum of \$15,000 in compliance with the conditions imposed by the court in its order overruling the motion for a new trial, but plaintiffs except to such ruling of the court.

#### **ASSIGNMENT OF ERRORS BY PLAINTIFF IN ERROR IN ITS BRIEF IN THE SUPREME COURT OF NEBRASKA AS FOUND ON PAGE 3 OF ITS BRIEF.**

IN THE SUPREME COURT OF THE STATE OF  
NEBRASKA.

LIZZIE L. WRIGHT ET AL., *Plaintiffs,*

VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
A CORPORATION, *Defendant.*

- I. The verdict of the jury is not supported by the evidence.
- II. The verdict is contrary to law.

III. The court erred in not sustaining defendant's motion to direct a verdict at the close of plaintiffs' case.

- IV. The court erred in not directing a verdict at the close of defendant's case.
- V. The court erred in giving instruction No. 1 given by the court.
- VI. The court erred in giving instruction No. 2 given by the court.
- VII. The court erred in giving instruction No. 3 given by the court.
- VIII. The court erred in giving instruction No. 4 given by the court.
- IX. The court erred in giving instruction No. 5 given by the court.
- X. The court erred in giving instruction No. 6 given by the court.
- XI. The court erred in giving instruction No. 7 given by the court.
- XII. The court erred in giving instruction No. 8 given by the court.
- XIII. The court erred in giving instruction No. 9 given by the court.
- XIV. The court erred in giving instruction No. 10 given by the court.
- XV. The court erred in giving instruction No. 11 given by the court.
- XVI. The court erred in giving instruction No. 12 given by the court.
- XVII. The court erred in giving instruction No. 13 given by the court.
- XVIII. The court erred in giving instruction No. 14 given by the court.
- XIX. The court erred in giving instruction No. 15 given by the court.

XX. The court erred in giving instruction No. 16 given by the court.

XXI. The court erred in giving instruction No. 17 given by the court.

XXII. The court erred in refusing to give instruction No. 1 requested by the defendant.

XXIII. The court erred in refusing to give instruction No. 2 requested by the defendant.

XXIV. The court erred in refusing to give instruction No. 3 requested by the defendant.

XXV. The court erred in refusing to give instruction No. 4 requested by the defendant.

XXVI. The court erred in refusing to give instruction No. 5 requested by the defendant.

XXVII. The court erred in refusing to give instruction No. 6 requested by the defendant.

XXVIII. The court erred in refusing to give instruction No. 7 requested by the defendant.

XXIX. The court erred in refusing to give instruction No. 8 requested by the defendant.

XXX. The court erred in refusing to give instruction No. 9 requested by the defendant.

XXXI. The court erred in refusing to give instruction No. 10 requested by the defendant.

XXXII. The court erred in refusing to give instruction No. 11 requested by the defendant.

XXXIII. The court erred in refusing to give instruction No. 12 requested by the defendant.

XXXIV. The court erred in refusing to give instruction No. 13 requested by the defendant.

XXXV. The court erred in refusing to give instruction No. 14 requested by the defendant.

XXXVI. The court erred in refusing to give instruction No. 15 requested by the defendant.

XXXVII. The court erred in refusing to give instruction No. 16 requested by the defendant.

XXXVIII. The court erred in refusing to give instruction No. 17 requested by the defendant.

XXXIX. The court erred in refusing to give instruction No. 18 requested by the defendant.

XL. The court erred in refusing to give instruction No. 19 requested by the defendant.

XLI. The court erred in refusing to give instruction No. 20 requested by the defendant.

XLII. The court erred in refusing to give instruction No. 21 requested by the defendant.

XLIII. The court erred in refusing to give instruction No. 22 requested by the defendant.

XLIV. The court erred in refusing to give instruction No. 23 requested by the defendant.

XLV. The court erred in refusing to give instruction No. 24 requested by the defendant.

XLVI. The court erred in refusing to give instruction No. 25 requested by the defendant.

XLVII. The court erred in overruling defendant's motion for a new trial.

XLVIII. Said verdict is grossly excessive and is the result of passion and prejudice.

XLIX. The court erred in not granting a new trial because of the excessiveness of the verdict.

XLX. The court erred in submitting the cause to the jury upon the theory that a recovery was permissible under the Nebraska Employer's Liability Act, when the evidence disclosed that the decedent was running from Fairbury, in Nebraska, to

Council Bluffs, in Iowa, and was engaged in interstate commerce at the time of his injury and the said cause should have been tried under the Federal Employer's Liability Act.

XLXI. The court erred in not holding that the decedent did not assume the risks arising from a collision with the switch engine and that no recovery was permissible.

### OPINION OF NEBRASKA SUPREME COURT.

LIZZIE L. WRIGHT ET AL., *Appellees*,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
*Appellant*.

Filed September 26, 1913. No. 17189.

1. Master and Servant: Injury to Servant: Rules: Sufficiency: Question for Jury. A railroad company has a right and it is its duty, to make reasonable rules for the protection of the safety of its employees, and such rules its employees are bound to regard and obey; but whether or not any particular rule, under the circumstances shown, is sufficient and adequate for the safety of the company's employees, is a question of fact for the jury.

2. Negligence. Under the rules of the defendant company, the switch engine in its Lincoln yards had the right to occupy the main track, protecting itself against overdue trains. The extra, which was being run by plaintiff's decedent, was required to proceed through the yard under full control, and protect itself within yard limits. The switch engine having the right of way over the extra, it was the duty of the decedent to be on the lookout for the switch engine and to take such precautions as the situation demanded to prevent a collision; but this did not relieve the crew of the switch engine from the exercise of ordinary care in avoiding a collision with the extra, which they knew had entered the yard.

3. Questions for Jury. The uncontradicted evidence shows that the defendant company, at and prior to the collision which caused the death of plaintiff's decedent, had not promulgated any written or printed rules regulating the rate of speed at which the switch engine might be run in its yards.

*Held*, That it was for the jury to say whether or not, under the circumstances shown, the failure of the company to adopt and promulgate such a rule was negligence on its part.

4. Negligence: Evidence. There being no evidence in the record tending to show negligence on the part of plaintiff's decedent, the question of contributory negligence does not arise.

5. Damages. The evidence shows that the decedent was a man of good health, 32 years of age; that he was earning from \$125 to \$150 a month; that his expectancy, according to the Carlisle table, would be 32 years. *Held*, That we can not say that \$15,000 is an excessive judgment under these circumstances.

6. Commerce: Interstate. Plaintiff's decedent was running a lone engine, as an extra, from one point to another in this state, not in connection with any cars. *Held*, That he was not engaged in interstate commerce.

7. Instructions complained of and set out in the opinion, examined, and held free from prejudicial error.

8. The evidence examined and set out in the opinion, held sufficient to sustain the verdict and judgment.

Appeal from the District Court of Lancaster county. Lincoln Frost, Judge. Affirmed.

M. A. Low, P. E. Walker, E. P. Holmes and G. L. DeLacy, for appellant.

George W. Berge, contra.

Fawcett, J.

From a judgment for \$15,000 in favor of the plaintiffs on account of the alleged negligence of the defendant in causing the death of Otto O. Wright, husband of plaintiff Lizzie L. Wright, defendant appeals.

The abstract contains 86 printed pages, the supplemental abstract 201 pages, the brief and reply brief of appellant 139 pages, and the brief of appellee 90 pages. To follow counsel through this voluminous record and through their equally voluminous briefs would necessitate an opinion of such length that it would be useless to the profession, for the reason that no lawyer would ever read it. We shall therefore deal directly with the material issues in the case.

Otto O. Wright was an engineer in the service of the defendant. At the time set out in the pleadings he was ordered to run an engine, No. 1486, as "an extra" from Fairbury to Albright, both points in Nebraska. In making this run he was required to pass through the city of Lincoln. After leaving the station at Lincoln, and while running north through the company's yards at a point a short distance from the Holdrege street viaduct, this extra collided with the company's switch engine No. 1220, which was used by the defendant in its Lincoln yards for switching purposes, causing the death of Mr. Wright. These two engines will hereinafter be referred to by their respective numbers. The point where the collision occurred was in a cut and on a curve. The controlling, and in fact the only real, question involved in this case is, Who was to blame for this collision?

It is shown that the defendant had rules for the guidance of its employes, including engineers. On its printed time-tables, such as were then used by engineers, rule 16 provided: "All except first class trains will approach (enter and pass through the following named yards under full control), expecting to find main track occupied or obstructed: Albright, Fairbury, Lincoln, Belleville, Jansen, Phillipsburg." Subdivision b of rule 9 provided: "The speed of trains in the city of Lincoln between M street (two blocks west of passenger station) and Vine street (east of coal dock) must not exceed six miles per

hour." Rule 97a in the book of rules promulgated by defendant provided: "Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks, protecting themselves against over due trains. Extra trains must portect themselves within yard limits." The term "under full control" in rule 16 all of the witnesses testified means "to be able to stop within the vision of the engineer." It is conceded that 1486 was required, while passing through the company's yards in the city of Lincoln, to proceed under such control. It is uncontradicted that the defendant had no written or printed rule relating to the rate of speed at which its switch engines might run within its yards. There is some testimony to the effect that there was some sort of an unwritten rule or understanding that switch engines should also be run under full control; but the evidence is entirely satisfactory, and not contradicted by any testimony offered by defendant, that defendant's switching crew did not consider that it was bound by any such rule, except as to that portion of the Lincoln yard between M and Vine streets, which portion was not only covered by subdivision b of rule 9, but also by a city ordinance. Defendant in its brief urges 13 assignments of error, which we will consider in their order.

[8] The first assignment is that the verdict is not sustained by sufficient evidence. In considering this assignment, the place where the collision actually occurred is important. There is a viaduct on Holdrege street at the place where that street is intersected by defendant's track. Holdrege street runs east and west. The collision occurred north of the viaduct. 1486 was running north, and 1220 south. In going north, after leaving the viaduct, the track curves to the east in a cut. The collision occurred in that cut. The point where the collision occurred is testified to by the engineer, fireman, switch foreman, and two of the switchmen who were riding on 1220, McLane, the fireman on 1486, and by four witnesses who resided in the immediate vicinity, and who visited the scene immediately after the collision. All of these witnesses locate the point of the collision as right opposite or a few feet south of a

barn standing on the first lot east of the track, which lot faces south on Holdrege street. This lot is 135 feet in depth. The four residents of the vicinity locate the collision a little south of the barn. McKinstry, a switchman on 1220, says that 1486, after the collision, was about 35 or 40 feet south of the building shown in the photograph, which is the barn referred to. Some of the switching crew testify that the collision occurred about 150 feet north of the viaduct. This testimony, however, was simply the opinion of the witnesses so testifying. This testimony cannot be considered in the face of the large number of witnesses whose uncontradicted testimony locates the exact place where the collision occurred in front or a few feet south of a fixed object or point by the side of the track. Considering, therefore, the length of the lot upon which the barn stood and the point in relation thereto, where these residents show the collision occurred, there is no escape from the conclusion that the collision actually occurred at a point about 100 feet north of the viaduct.

It is admitted that all of the members of the switching crew knew that the extra 1486 was in the yard. McKinstry, the switchman above referred to, was the first to discover that the two engines were running towards each other on the main track. He testifies that he immediately gave the alarm. The men on 1220 testify that when McKinstry gave the alarm the engineer threw on the emergency brake. When 1220 had run about 75 or 100 feet, McKinstry and some of the others jumped from the engine. All of the crew, including the engineer, jumped; but whether the others jumped at the same time McKinstry and Carr did, is not shown. Possibly the engineer remained on a little longer. According to McKinstry and Carr, 1220 proceeded about 25 feet after they jumped before the collision occurred, so that, according to their testimony, 1220 proceeded about 100 feet after McKinstry gave the alarm before the collision occurred. Some of the witnesses on 1220 testify that at the time McKinstry gave the alarm 1220 was running from three to five miles an hour; others say from three to four miles an hour; yet McKinstry and Carr both say

that when the collision occurred 1220 was going "not to exceed three miles an hour." The witness Palmer, engineer on the company's switch engine at the time of the trial, testified that he was familiar with engine 1220, and had run it; that an engine running at a rate of 5 miles an hour ought to be stopped in 20 feet, at 10 miles an hour in 30 feet, at 15 miles an hour in 45 feet, and at 20 miles an hour in 60 feet. This testimony stands uncontradicted. It is thus clearly established that 1220 must have been running at a high rate of speed, or that the emergency brake was not applied and the engine reversed before the crew jumped from the engine. It is testified to by some of the crew of 1220, and conceded in the brief of defendant, that at the time McKinstry discovered 1486 approaching it was at least 50 feet north of the viaduct. That fact being established, and also the fact that the collision occurred not over 100 feet north of the viaduct, it stands established as a fact that 1486 did not run to exceed 50 feet after its engineer, Wright, discovered the approach of 1220. A photograph introduced in evidence was taken at a point 420 feet north of the viaduct. It shows the barn above referred to, the cut and curve, and the rails of the track from that point to the viaduct, and clearly shows that at any point within that 420 feet two engines approaching from opposite directions would have a clear view of each other. 1486 being 50 feet north of the viaduct, it is beyond question that the point of view in the photograph could have been extended that number of feet further north, so that there was a clear, open view of the track for the entire distance of 420 feet when the engines came within the vision of the two engineers. Of that 420 feet, 1486 only traveled about 50 feet when the collision occurred, while 1220 traveled 370 feet. As we view the record, there is no escape from these facts. This being true, then, the conclusion is irresistible that the engineer of 1486 was proceeding north with his engine under full control; that the engineer of 1220 was proceeding south with his engine not under full control, but traveling at such a rate of speed that he was unable to stop it within a distance of 370 feet, and that,

even after traveling that distance, his engine was still going at the rate of two or three miles an hour.

Mr. Burleigh, trainmaster for the Nebraska division of the defendant road, was called as a witness by defendant. Defendant's abstract of Mr. Burleigh's testimony sets out only that part showing that engineers were examined by him as to their fitness, and as to the published book of rules; that he had examined Wright; that Wright had a clear understanding of the rules; that he informed Wright that switch engines had a right over all except first-class trains in yard, and that all other trains would have to look out for them; that he read the rules to Wright, who gave him his understanding of the same as they were read; that Wright gave as his understanding the term "under full control" as meaning "to run at a speed which would make it impossible for two trains coming in opposite directions to collide with one another." That is not the meaning given by any other witness. If that be the meaning of the term, you could not run an engine at all without having a flagman in advance to warn you of approaching trains. An important part of Mr. Burleigh's testimony, not set out in defendant's abstract, appears in plaintiff's supplemental abstract: "Q. When you say you examine men for switch engines do you use these rules? A. Yes, and the time tables. Q. You tell switch engine men that they have a right to run 25 miles an hour in the yards? A. Yes, sir. Q. You tell them that? A. If they want to—I don't tell them anything about running. Q. How is that? A. I don't tell them anything about how fast they shall run, or how slow. Q. You understand, of course, that they can at any time run their engines negligently? A. I understand that, yes."

Mr. Carr, the switch foreman, testified that when they went around that curve they always slowed up to save steam. "Q. But you went on the theory and assumed the right that everything had to get out of the way for you except this passenger? (By the term "this passenger" the questioner meant a passenger train which was due to pass through a few

minutes prior to the time of the collision, but which train was some 12 or 15 minutes late.) A. Yes, sir. Q. Although you knew the extra was in the yards? A. Yes, sir. \* \* \* Q. Have you any rule applying to switch engines about running under control? A. No, sir." It will be seen, therefore, that in the defendant's yard the switch engine was a free lance as against all except first-class trains.

[1, 3, 7] The second assignment is that the court erred in submitting the sufficiency and reasonableness of the company's rules to the jury. In the instructions complained of the court told the jury that the question as to whether the defendant was negligent in one or more respects alleged in the petition, as set out in subdivisions a, b, c, and d of the first paragraph of the instructions, which stated the allegations of the petition, "is one of the material elements of plaintiff's cause of action to which the jury should direct their attention in determining upon their verdict. Negligence may be defined as the omission to do something which a reasonable man guided by those conditions which ordinarily regulate the conduct of human affairs would under the circumstances do, or doing something which a reasonable man would not do under the circumstances. In other words, negligence is the absence of care according to the circumstances." By instruction No. 8 the court instructed the jury: "Touching subdivision 'a' of the first paragraph of these instructions, you are further instructed that it was the duty of the defendant company to exercise reasonable care to adopt and promulgate reasonable rules for the control and conduct of its business in all cases, in case its business had become sufficiently extensive to demand their adoption in the exercise of reasonable care for the protection of its employees. In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries." Instruction No. 10: "You are instructed that under the rules

of the company the light engine, which was being run by plaintiff's intestate as an extra, was required to run and pass through the Lincoln yards 'under full control.' It is for you to say from the testimony what the term 'under full control' means, and then to apply your interpretation to the rules of the defendant company in which the term is used, and also to the acts of Otto O. Wright in compliance with or failure to comply with such rules, in determining whether his acts were in compliance with or in violation of defendant's rules." Instruction No. 11: "If you find from the evidence that the defendant was negligent in one or more of the particulars alleged, and as set out in the first paragraph of these instructions, and if you further find from the evidence that such negligence proximately contributed to the injury of plaintiff's intestate, then you should direct your attention, among other things, to the defendant's claim that plaintiff's intestate was negligent, and also that he assumed the risks of his employment." The gist of defendant's complaint as to the foregoing instructions is that they submitted to the jury the reasonableness and sufficiency of the rules governing the operation of the switch engine in its yards. A number of authorities are cited by defendant in support of its contention. While we concede that in the main they sustain defendant's point that the reasonableness and, in some cases, the sufficiency of the rules are questions of law for the court, and not for the jury, this is not by any means the universal rule.

In *Southern R. Co. v. Craig*, 113 Fed. 76, 51 C. C. A. 63, the syllabus holds: "(1) Plaintiff's intestate, a railroad conductor on an extra train, had orders to precede a delayed regular train into defendant's yards. No instructions were given to look out for any other train on entering the yards. Intestate was killed in a collision with a switching engine in the yards. No notice of the approach of the extra train had been given to those on the switch engine. (In this case the switching crew had full notice of the presence of 1486 in the yard.) The company's rules, known to intestate, gave the right of way to switch engines in the yards, and required that extra trains

must approach and run through yard limits under full control. The evidence as to whether intestate's train was under full control was conflicting. The night of the accident was shown to have been dark and foggy. Held that, notwithstanding the rules of the company, it was the duty of the crew of the switching engine to exercise ordinary care in avoiding collisions with incoming trains. (2) An instruction that the crew of the switching engine should take proper precautions against collisions with incoming trains, the character of such precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals, was correct. (3) The question as to whether intestate observed the rule of having his train under full control on entering the yards was for the jury.' In that case the company requested the following instruction: 'Under the rules the switch engine had the right to the use of the main line, protecting itself against only regular trains. The extra was required to proceed through the yard under full control. This requirement applied, not only to the speed of the train, but to such precautions in addition as the dark and foggy night demanded. The switch engine having the right of way over the extra, it was the duty of the other to be on the lookout for the switch engine, and to take such precautions as the situation demanded to prevent a collision.' The trial court modified the instruction by adding: "Yes; but it did not relieve the switching engine from the exercise of ordinary care in avoiding collisions with trains entering the yard." The defendant requested this instruction: "The rules of the company do not require notice of the movements of extra trains to be given to the crew of a switch engine working within the yard limits, and it is not negligence on the part of the defendant not to have given such notice," which the trial court modified by adding: "But the crew of the switching engine should take all proper precautions against collisions with trains entering the yards, the character of these precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals." In the opinion the court say (113 Fed. 79, 51 C. C. A. 66): "We find no error in the modifica-

tions made by the court in giving the instructions requested. After giving the first instruction requested, the court simply said, in substance, that it was the duty of the switching engine to exercise ordinary care in avoiding collisions with trains entering the yard. We cannot conceive of any circumstances under which the operators of a railroad train are relieved from the use of ordinary care to prevent collisions with other trains. This is a duty that devolves upon those running and operating trains at all times. What constitutes ordinary care depends upon the relationship of the parties and the circumstances common prudence under certain conditions would not be under others." The judgment of the trial court was affirmed.

We think this reasoning is eminently sound, and its application to the switching crew in charge of 1220 is apparent. They knew the extra was in the yard. They had been expressly notified of that fact. They knew that when the extra moved further through the yards it would be running on the main track, and for them to run their engine upon the main track around the curve and through the cut at the rate of speed at which they were unquestionably running was a reckless disregard of the lives of those upon the engine of the extra. That they knew they were liable to meet the extra is shown by what Switchman McKinstry said when he saw 1486 coming. His language was: "Get off; here comes that extra." \* \* \*

Q. Let me refresh your memory; did you say, "There she is?" Did you use that language? A. I don't know whether I did or not; I just told them to get off. "There comes the extra."

A rule that a switch engine may run through the yards on the main line not under control but at a high rate of speed, when its crew all know that there is an "extra" on the main line passing through the yards, would be a barbarous rule, and, if the rules of a railway company permit such a practice, it should be held liable for injuries to employes on the extra who are injured while such extra is being operated in compliance with the rules of the company, viz., under full control. If the reasonableness of a rule is for the court and not for the jury.

the court should in such a case instruct the jury that such a rule is unreasonable. Submitting the question to the jury in such a case could not, therefore, prejudice defendant.

Directly upon the question of submitting to the jury the sufficiency of the company's rules, *Texas & P. R. Co. v. Cumpston*, 15 Tex. Civ. App. 493, 40 S. W. 546, is an instructive case. The fourth paragraph of the syllabus holds: "In an action for negligence of an employer in failing to provide rules whereby an employe was killed, plaintiff need not allege or prove exactly what rules should have been made."

Mr. Labatt, in his work on Master and Servant, vol. 1 (Ed. 1904) sec. 228, in discussing the question of reasonableness, says: "Whether the reasonableness of a rule is a question for the court or the jury is one as to which there is much apparent conflict between the authorities. One theory is that this question is always for the court; the reason assigned for this view being that it would otherwise be impossible to secure a uniformity of view, or to insure that a rule pronounced reasonable in one case by a jury might not be pronounced unreasonable by another jury in a subsequent case. Another view is that the question is primarily one for the jury. Some courts have enunciated an intermediate doctrine which seems to be more in harmony with general principles, viz., that the reasonableness of a rule is a mixed question of law and fact, except in plain cases." The author cites numerous authorities in support of all three of the theories.

In *Crew v. St. Louis, K. & N. W. R. Co.* (C. C.) 20 Fed. 87, it is held in the syllabus: "It is negligence on the part of railroad companies to fail to adopt such rules and regulations as are proper and necessary for the protection of the safety of its employes." The trial court charged the jury: "I say generally that the railway company has a right, and it is its duty, to make rules for the protection of the safety of its employes, and such rules its employes are bound to regard and obey. But under the form of making rules, of course, a railroad company cannot exempt itself from negligence. Its rules must

be such as tend to the protection of the lives of its employes. With this general statement in regard to the rules, you may take and consider them." The jury found for the plaintiff, and in an opinion by Brewer, J., the verdict was sustained, and the motion for a new trial was overruled.

In *Merrill v. Oregon Short Line R. Co.* 29 Utah 264, 81 Pac. 85, 110 Am. St. Rep. 695, the syllabus holds: "(1) A master is under a primary and nondelegable duty to use ordinary care not only to promulgate, but also to enforce, reasonable rules and regulations for the safety of his servants, when the nature of the work requires it, and this duty is not performed merely by promulgating the rules, and using ordinary care in selecting men to enforce them. (2) The fact that the negligence of a fellow servant concurs with the negligence of the master in causing injury to a servant does not exempt the master from liability for his negligence." In the opinion (29 Utah 279, 81 Pac. 88, 110 Am. St. Rep. 695) it is said: "We think the evidence on behalf of respondents was quite sufficient to submit to the jury the question as to whether appellant used ordinary care, not so much, probably, in establishing and promulgating rules and regulations, but particularly in using ordinary care to enforce them \* \* \* The truth and the weight of this testimony were for the jury, which, if believed by them, was sufficient to find that ordinary care had not been used by the appellant in either establishing or in enforcing rules and regulations for the safety of its servants."

In *Murphy v. Hughes*, 1 Pennewill (Del.) 250, 40 Atl. 187, it is held: "The question as to whether an employer has made proper rules for the government of his employes is for the jury." In the opinion it is said (1 Pennewill, 259, 40 Atl. 188): "It is, however, always a question for the jury to determine whether such rules are sufficient for the purpose."

In *Devoe v. New York City & H. R. R. Co.*, 174 N. Y. 1, 66 N. E. 568, the first paragraph of the syllabus reads: "Car inspectors employed at a station at which there were many tracks and switches upon which a large number of trains

passed every day were required to inspect each car of each train while it was at the station, at which time there was much switching and moving of cars. Several inspectors had been injured in the performance of such duties, and many complaints had been made as to the dangerous character of the work. There was but one printed rule on the subject, which had never been enforced. Held, in an action for the death of a car inspector killed by the backing up of a train against the train under which he was working, that it was for the jury whether a parol rule, claimed to have been made by the foreman of the car department, without instructions from any one, was in use, and was sufficient, and properly promulgated under the facts."

In *Lake Shore & M. S. R. Co. v. Murphy*, 50 Ohio St. 135, 33 N. E. 403, it is held: "It is the duty of a railway company to afford reasonable protection to its employes against dangers incident to their work. *Railway v. Lavalley*, 36 Ohio St. 221, approved and followed. And if, under the circumstances of this case, a rule providing for warning was necessary, and by the exercise of reasonable care on the part of the company that necessity could have foreseen, it was the duty of the company to prescribe such rule. Whether it ought to have so provided or not was a question for the jury."

In *Abel v. Delaware & Hudson Canal Co.*, 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773, it is held: "In an action against a railroad company for damages for the death of an employe, a repairman, which occurred while he was engaged in repairing defendant's cars standing upon a side track, which were run into by one of defendant's engines, it is for the jury to say whether or not defendant's rules providing for the safety of repairmen so employed are adequate for that purpose, and the court errs in ruling, as matter of law, that they are sufficient." In closing the opinion, the court say (103 N. Y. 587, 9 N. E. 326, 57 Am. Rep. 773): "We do not perceive how it was possible to say, as matter of law, that the rules of the defendant were proper and sufficient for the protection of its repairmen, and that it should not have taken greater precautions, by rules

or otherwise, for their safety. We think the facts should have been submitted to the jury, and that the nonsuit was improper." A judgment of reversal therefore followed.

In *Chicago, B. & O. R. Co. v. McLallen, Admr.*, 84 Ill. 109, the fourth paragraph of the syllabus holds: "A railway corporation has the lawful right to make reasonable rules for the conduct of its employes, and also for the conduct of passengers. Whether any given rule be reasonable, and therefore within the power of the corporation, or whether it be unreasonable, and therefore ultra vires, is a question of law for the court; but whether such rules are adequate for the safety of others and the management of the trains is a question of fact for the jury." In that case the decedent was a conductor in charge of an extra train, commonly called a "wild train." Plaintiff recovered a verdict and judgment for \$4,500, which was affirmed. In the light of the authorities above cited, to which others might be added, defendant's second assignment must be decided adversely to it.

The third assignment is that the court erred in submitting to the jury subdivision b of instruction 1, viz.: "In the failure to give said Wright timely warning by bell or whistle of the approach of said switch engine." The language above referred to was used by the court simply in stating the issues to the jury. Defendant has not called our attention to any other instruction where that language is used.

[9] The fourth assignment is that the court erred in submitting to the jury the question whether defendant's employes upon the switch engine, as soon as they discovered the engine of plaintiff's intestate, jumped from their engine without reversing the same and without trying to stop. Counsel say this question should not have been submitted to the jury, for the reason that the undisputed testimony in this record of the witnesses introduced by both plaintiff and defendant is that at the very first moment the presence of 1486 was known the engineer applied all the apparatus on the engine to stop it, and actually did stop it in a very short distance. The trouble with this contention is that the undisputed evidence does not show

absolutely that the engineer applied all the apparatus on the engine to stop it; but, instead of showing that he actually did stop it, the evidence shows that it had not stopped when the collision occurred. This question was properly submitted to the jury.

The fifth assignment is that the court erred in submitting to the jury the question as to whether defendant was guilty of negligence in running the switch engine around a curve at a negligent and dangerous rate of speed without having the same under control. What we have said under the first assignment disposes of this adversely to defendant.

The sixth assignment is that the court erred in giving instruction 10. This instruction has already been set out and disposed of under the second assignment.

[10] The seventh assignment is that the court erred in giving instruction No. 13: "As to the defense of contributory negligence, and also as to the defense of assumption of risks, the burden of proof is upon the defendant to establish both of said defenses by a preponderance of the evidence, as those terms have been hereinbefore defined." There was no error in this instruction. *Grimm v. Omaha E. L. & P. Co.*, 79 Neb. 395, 114 N. W. 769; *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459, 63 N. E. 541; *Arenschield v. Chicago, R. I. & P. R. Co.*, 128 Iowa 677, 105 N. W. 200; *Mace v. Boedker & Co.*, 127 Iowa 721, 104 N. W. 475.

[4] The eighth assignment is that plaintiff's intestate was guilty of gross negligence. We spend no time in discussing this assignment as there is an entire absence of evidence to show any negligence on the part of plaintiff's intestate.

The ninth assignment is the legal sufficiency of the evidence for the court. In discussing this assignment, counsel say that in the trial court counsel for plaintiff relied on the Nebraska Employer's Liability Act (Comp. St. 1911, ch. 21, secs. 3-5), which modifies the defense of contributory negligence. What we have said in answer to the eighth assignment is a sufficient

answer to this. There was no contributory negligence on the part of plaintiff's intestate. This also disposes of the tenth assignment.

[5] The eleventh assignment is that the verdict was the result of passion and prejudice, and is excessive. The evidence shows that the decedent was a man of good health, 32 years of age; that he was earning from \$125 to \$150 per month; that his expectancy, according to the Carlisle tables would be 32 years. We cannot say that \$15,000 is an excessive judgment for the death of a man under these circumstances.

[2] The twelfth assignment is that the decedent assumed risk of collision with switch engines. We think counsel for plaintiff answer this contention in plaintiff's brief, where it is said: "Engineer Wright assumed the risks ordinarily incident to the business he was engaged in; but he did not assume any negligence of the defendant, and certainly did not assume the reckless conduct of the switch engine on this particular day."

[6] The thirteenth assignment is that the court erred in submitting the case under the Employer's Liability Act. The contention under this assignment is that engine 1486 was on its way from Fairbury to Council Bluffs, Iowa, and hence Wright "was engaged in interstate commerce." It is probably true that, if Mr. Wright was engaged in interstate commerce at the time he was killed, the remedy would be under the federal act exclusively; but the trouble with this contention is neither Mr. Wright nor engine 1486 was at the time engaged in interstate commerce. His order was to take this engine from Fairbury, in Nebraska, to Albright, in Nebraska. He was running the engine without cars or train of any sort. The engine, so far as we can gather from the record, was defective, and was on its way to the car shops for repairs. In *Chicago & N. W. R. Co. v. United States*, 168 Fed. 236, 93 C. C. A. 450, 21 L. R. A. (N. S.) 690, the Circuit Court of Appeals for this circuit held: "The necessary movement of a defective empty car alone, for purpose of repair only, and not in connection with any cars commercially used does not subject the

carrier to the penalties of the acts." A similar holding was made by the same court in *United States v. Rio Grande W. R. Co.*, 174 Fed. 399, 98 C. C. A. 293. The same rule will, of course, apply to an engine.

We have given this case very careful consideration. We have examined the record with great care, and are unable to find in it any prejudicial error.

The judgment of the district court is therefore affirmed.

*Wright v. C., R. I. & P. R. Co.*, 94 Neb. 317.

*Wright v. C., R. I. & P. R. Co.*, 143 N. W. 221.

**DEFENDANT'S MOTION FOR RE-HEARING IN ITS BRIEF.  
IN THE SUPREME COURT OF THE STATE OF  
NEBRASKA.**

LIZZIE L. WRIGHT, AND HENRY C. BERGE, ADMINISTRATORS OF  
THE ESTATE OF OTTO WRIGHT, DECEASED, *Appellees*,

VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, A  
CORPORATION, *Defendant and Appellant*.

APPEAL FROM DISTRICT COURT OF LANCASTER COUNTY.

Lincoln Frost, Judge.

Comes now the Chicago, Rock Island & Pacific Railway Company and moves the court to grant a rehearing in the above entitled case for the following good and sufficient reasons, to-wit:

**I.**

The decision of the court is absolutely contrary to the evidence in the case.

**II.**

The decision is contrary to law.

**III.**

The court in the opinion bases its conclusion on mistaken and erroneous statements of what the evidence discloses.

## IV.

The finding of fact of the court that the accident occurred 100 feet north of the viaduct is wrong, and is contrary to all the evidence in the record.

## V.

The finding in the opinion that the switch engine was exceeding five miles an hour is erroneous and wrong and not supported by any evidence in the case. All the undisputed evidence of both the plaintiff and defendant placing the speed of the switch engine from three to five miles an hour when the two engines first appeared in sight of each other.

## VI.

The finding and the holding of this court that the deceased, Otto Wright, was not guilty of any contributory negligence is absolutely contrary to the evidence and the evidence disclosing that five miles per hour is the maximum rate of speed at which an engine can be run around the cut and curve at the place of the accident and be under full control, and the evidence disclosing that Mr. Wright was running ten miles an hour.

## VII.

The court erred in finding and holding that Mr. Wright was running from Fairbury to Albright instead of from Fairbury to Council Bluffs, the last named being a division, and the undisputed evidence in the record being that Mr. Wright was taking his engine from Fairbury to Council Bluffs.

## IX.

The court erred in holding and in finding that Mr. Wright was not engaged in interstate commerce.

## X.

The court erred in holding as a matter of law that the rules of this appellant company were insufficient, and in holding that no error existed in submitting their sufficiency to the jury, for the reason that because of the submission to the jury of the sufficiency of the company's rules in the Lincoln yards,

gross error existed in the record, and this court erred in not reversing this case.

### XI.

This court erred in not finding and holding from the evidence that Mr. Wright was guilty of contributory negligence more than slight, and in not reversing said case on account thereof.

### XII.

For the reason that the lower court erred in submitting subdivision "b" of instruction No. 1 to the jury, which was error because of which this court should have reversed the case.

### XIII.

This court erred in holding and finding that there was any evidence to submit to the jury whether defendant's employees upon the switch engine jumped from their engine without reversing the same and without trying to stop the same for the reason that the undisputed evidence was that said engine was reversed and the emergency put in before appellant's employees jumped.

### XIV.

The court erred in finding that there was sufficient evidence to be submitted to the jury upon the question of the appellant's negligence in running said switch engine around said curve at a negligent and dangerous rate of speed without having the same under control.

### XV.

The giving of instruction No. 13 by the lower court was error and this court erred in not so holding and in holding that there was no contributory negligence to warrant the giving of this instruction.

### XVI.

This court erred in not holding that Mr. Wright assumed the risk of operating engines under the rules established by the company.

## XVII.

This court erred in not holding that said verdict was the result of passion and prejudice and in not holding the same to be excessive and in not reversing said case because thereof.

**OPINION ON RE-HEARING MOTION OF NEBRSAKA  
SUPREME COURT.**

Opinion on motion for rehearing of case reported in 94 Neb. 317. Rehearing denied, and former opinion modified. Filed April 18, 1914. No. 17189:

*Per Curiam.* After the reargument in this case, we have carefully re-examined the record and are satisfied with the following language in the former opinion (94 Neb. 317), for the reasons there given: "A rule that a switch engine may run through the yards, on the main line, not under control, but at a high rate of speed, when its crew all know that there is an 'extra' on the main line passing through the yards, would be a barbarous rule; and, if the rules of a railway company permit such a practice, it should be held liable for injuries to employees on the extra who are injured while such extra is being operated in compliance with the rules of the company, viz., under full control. If the reasonableness of a rule is for the court, and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable. Submitting the question to the jury in such a case could not, therefore prejudice defendant." The decedent was running his engine under full control, within the meaning of the rule of the company. There was no express rule as to the speed allowed to the switch engine. Of course, the law requires that such engine should not be run at an unreasonable rate of speed under the circumstances. The engineer of the switch engine must have had a clear view of the approaching engine for at

least 420 feet, and it was run at least 370 feet of this distance before the collision occurred. It could have been stopped within a distance of 60 feet unless running at a greater speed than twenty miles an hour, and, knowing, as the crew of the switch engine did, that No. 1486 was in the yards, to run at a greater speed than 20 miles an hour in such a locality and under such circumstances was in itself negligence. In such a case the court might properly have told the jury that any rule of the company which permitted such action was unreasonable, and the giving of an erroneous instruction as to the reasonableness of the rules would be without prejudice to the defendant. There is, however, no doubt that the instruction given by the court was erroneous. The jury were told: "In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries"—thus submitting to the jury to determine the reasonableness of the rules of the company as a whole so far as they were or were not sufficient to protect the employees. Different juries might not take the same view of a system of rules for the running of trains and engines in a complicated railroad yard, and it is beyond their power to determine what those rules should be. When the question of negligence depends upon the reasonable sufficiency of a certain rule, the court should determine the question, if the facts are not in dispute. If the facts upon which the reasonableness of the rule depends are in substantial conflict, the court should tell the jury plainly under what conditions the rule would be reasonable and allow the jury to determine the facts. In such cases the reasonableness of the particular rule becomes a mixed question of law and fact, the law to be determined by the court and the facts by the jury. To this extent our former opinion is modified, and, as there is

no prejudicial error in the verdict for the reasons stated above, and in our former opinion, the motion for rehearing is overruled and our former judgment adhered to.

*Wright v. C., R. I. & P. R. Co., 146 N. W. 1024.*

*Wright v. C., R. I. & P. R. Co., 96 Neb. 87.*

*Halluck & Rose*

Omaha, Nebraska,

*Attorney and Counsel for Defendants in Error.*

GEORGE W. BERGE,  
Lincoln, Neb.,  
*Of Counsel.*

No. 167

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JAMES E. MAHER

CLERK

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

October Term 1915

LEZZIE L. WRIGHT AND HENRY C. BERGE, ADMINIS-  
TRATORS OF THE ESTATE OF OTTO O. WRIGHT,  
DECEASED, DEFENDANTS IN ERROR,

VS

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY, A CORPORATION, PLAINTIFF IN ERROR.

~~RECEIVED~~

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

CHIEF OF PLAINTIFF IN ERROR IN RESISTANCE TO MOTION  
OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

PAUL E. WALKER, *Attorney, Kansas, Attorney and Counsel for*  
*Plaintiff in Error*

E. B. HOLMES, *Attorney, Nebraska, of Counsel*

WITNESSED the Seal of the Court, Lincoln, Nebraska.



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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

October Term 1915.

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LIZZIE L. WRIGHT AND HENRY C. BERGE, ADMINIS-  
TRATORS OF THE ESTATE OF OTTO O. WRIGHT,  
DECEASED, DEFENDANTS IN ERROR,

VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY, A CORPORATION, PLAINTIFF IN ERROR.

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Number 505.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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**BRIEF OF PLAINTIFF IN ERROR IN RESISTANCE TO MOTION  
OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.**

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PAUL E. WALKER, *Topeka, Kansas, Attorney and Counsel for  
Plaintiff in Error.*

E. P. HOLMES, *Lincoln, Nebraska, of Counsel.*

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**STATEMENT OF FACTS.**

The record has not as yet been printed and is not avail-  
able to either party, but the defendants in error have so  
erroneously stated the evidence and the facts that it is

difficult to discuss their motion. Again the defendants in error constantly reiterate the statement that the plaintiff in error conceded this or that proposition when as a matter of fact it at no time conceded or admitted such propositions so that it makes necessary in this discussion that such assertions be answered. We are not aware of counsel's reason for constantly mis-stating the position of the plaintiff in error during the trial as to conceding certain propositions of law, when the record shows nothing concerning any such admissions or concessions, but affirmatively discloses on the other hand a contrary attitude.

The undisputed evidence shows that the deceased was operating an engine as engineer, which was going from Fairbury, in the state of Nebraska, to Council Bluffs, in the state of Iowa. That he had brought it from Phillipsburg, Kansas, and was taking it to Council Bluffs, Iowa. If the record was printed and available for examination, the court would readily see that during the trial the defendants in error were seeking to prove that the engine was only running from Fairbury to Albright,—instead of from Fairbury, Nebraska, to Council Bluffs, Iowa, while the undisputed evidence shows that the engine was being taken to Council Bluffs, Iowa.

The trial court, held, as did the supreme court of the state of Nebraska, that even though the engine was being taken from Fairbury, Nebraska to Council Bluffs, Iowa that because the running orders delivered to the deceased stated "run from Fairbury to Albright" that therefore, there was no interstate movement. That is, if a train was running from Lincoln, Nebraska, to Denver, Colorado, and the first engineer received an order to run from Lincoln to some other point in Nebraska that he would not be engaged in interstate commerce because of such order. Such a proposition is of course, erroneous. The time table (Exhibit "9") shows that at a point a little past Albright, the Rock Island trains run over the Union Pacific tracks and do so until they reach Council Bluffs, and while running over the Union Pacific

tracks, the Rock Island trains work under Union Pacific orders, and the Rock Island issues no orders past Albright until the Council Bluffs yards are reached.

In the answer filed by plaintiff in error it was alleged as follows:

"The defendant further answering, alleges that it owns and operates a steam railway system running through Nebraska, Iowa, and Illinois, and other states, and is engaged in commerce between the several states, and that at the time of the injury complained of in plaintiff's petition, the said engine was being taken, and the said Otto O. Wright, was taking the same from Fairbury, Nebraska, to Silvis, Illinois, and that at the time of his injury and death, the said Otto O. Wright, was employed by this defendant in interstate commerce, and was engaged in interstate commerce, and that this court by reason thereof is without jurisdiction of the subject matter of this suit."

"Wherefore, the defendant prays that judgment may be for it and that plaintiffs' cause of action be dismissed, and for judgment for costs."

And this defense the plaintiff in error at all times during the trial urged and claimed that the federal act applied and that not only should the case be tried under the federal employers' liability act, but that being tried under that act, the federal court alone had jurisdiction. The statement of counsel in their brief in support of their motion that the plaintiff in error conceded that the state act applied during the trial is not based on fact, as the plaintiff in error at all times during the trial urged that the federal act applied and not the state act, and in its motion to direct a verdict, urged that a case had not been made against the defendant company under the pleadings and proof, but the trial court overruled its contention and held that as the running orders issued while passing through Nebraska read "run Fairbury to Albright" that it was not an interstate movement. In plaintiffs in error assignments of error in the supreme court of the state, appeared the following assignment:

"The court erred in submitting the case to the jury upon the theory that a recovery was permissible under the

Nebraska Employers' Liability Act when the evidence disclosed that the decedent was running from Fairbury, in Nebraska, to Council Bluffs, in Iowa, and was engaged in interstate commerce at the time of his injury, and the said cause should have been tried under the Federal Employers' Liability Act."

The supreme court of the state of Nebraska in its opinion held adversely to the company's contention and held that the federal act did not apply.

In its brief for rehearing, the plaintiff in error again urged the claim that the federal act and not the state act should apply and the supreme court again overruled its contention. The following testimony appears in the record as to the movement of this engine and this is undisputed:

WITNESS McLANE, fireman on Mr. Wright's engine on day of accident, testified as follows when called as a witness by plaintiff:

Q. 3427. "You remember the date that Mr. Wright was killed?"

A. "Yes, sir."

Q. 3432. "Where was it that he was killed?"

A. "At Holdrege street, Lincoln. I think it was about one hundred feet east of the overhead bridge at Lincoln."

Q. 3433. "Which way was his train going?"

A. "East to Council Bluffs."

Q. 3438. "What was his occupation that day?"

A. "Engineer on this engine."

Q. 3439. "State what kind of a train that was that day that you and Mr. Wright was on."

A. "We had no train, whatever, just a lone engine."

Q. 3440. "Do you remember now the number of the engine?"

A. "Yes, sir."

Q. 3441. "What was the number?"

A. "1486."

Q. 3444. "Were you firing for him during the two days?"

A. "Yes, sir."

Q. 3445. "Where?"

A. "On the west end, made a trip going west out of here and return."

Q. 3446. "When you say the west end, what do you mean?"

A. "It means, the western part of our division out here; it is always referred to here as east end, and west of here is west end."

Q. 3447. "And how many runs had you made with him west before this day?"

A. "Just the one."

Q. 3448. "Where did you run to?"

A. "From here to Phillipsburg and return."

Q. 3449. "Phillipsburg, Kansas?"

A. "Yes, sir, and return."

Q. 3455. "And what do you say was your destination that day, going east, you and Mr. Wright?"

A. "We started from here to take Engine 1486 to Council Bluffs, Iowa."

Same witness:

Q. 3465. "Did you know when you left Fairbury, where you were going?"

A. "Yes, we knew where we were going."

Q. 4366. "You knew that yourself?"

A. "Yes."

Q. 3467. "State if you know, where you were going?"

A. "We were called to take this engine to Council Bluffs, Iowa."

Same witness:

Q. 3476. "Well whatever your recollection may be about that, state whether you knew when you started, where you were going with that engine."

A. "Yes, I knew we were going to Council Bluffs" (pp. 362 to 364, 365 and 366, B. of Ex.).

WITNESS L. H. HINITT, who was riding on the engine with Mr. Wright as flagman, testified as follows:

Q. 4116. "Did you accompany Mr. Wright on that trip?"

A. "At the time he was killed?"

Q. 4117. "Yes."

A. "Yes, sir."

Q. 4118. "And where did you start?"

A. "Fairbury, Nebraska, from Fairbury."

Q. 4119. "And did you know where your destination was?"

A. "Yes, sir."

Q. 4120. "Where?"

A. "Council Bluffs, Iowa" (p. 428, B. of Ex.).

The evidence discloses that the deceased on the day of his death was taking a lone engine from Fairbury, Nebraska, to Council Bluffs, Iowa. That he reached Lincoln, Nebraska, and started a little after the noon hour on his journey. A short distance from the depot in Lincoln, close to the outskirts of the town, but within the city limits, is what is known as the Holdrege street viaduct," and it was while the deceased was operating his engine under this viaduct and while passing around a curve a little beyond the viaduct that he ran into a switch engine and was killed.

As one of the grounds of negligence the petition of the plaintiff alleged that the company's rules were insufficient, that is, the rules governing the movement of trains in the Lincoln yard, and the court in submitting the case to the jury submitted the sufficiency of the company's rules to the jury by the following instructions:

"(a) In the failure of defendant to promulgate suitable rules for the safety of its employes in the conduct of its business, the operation of its trains, and the management of its yards in the city of Lincoln and especially in failing to provide suitable rules for the operation in said yards, among other things providing that the switch engines are bound only to watch for first class trains and passenger trains, and that all other trains need only run under control, and in not having rules providing that its switch engines within the yard limits coming around said curve should always sound its whistle or ring its bell."

Paragraph 6 is as follows:

"If you find from the evidence and under these instructions that the defendant was negligent in one or more of

the respects as set out in the subdivisions (a), (b), (c), and (d) of the first paragraph of these instructions, then you should determine from the evidence whether such negligence proximately contributed to the death of plaintiffs' intestate—in other words, was the proximate cause thereof."

Paragraph 8 is as follows:

"Touching subdivision (a) of the first paragraph of these instructions you are further instructed that it was the duty of the defendant company to exercise reasonable care to adopt and promulgate reasonable rules for the control and conduct of its business in all cases, in case its business had become sufficiently extensive to demand their adoption in the exercise of reasonable care for protection of its employees. In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switching engines, in the Lincoln yards were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries."

The accident it is conceded occurred within the yard limits of the railway company at Lincoln, Nebraska and plaintiff's evidence is undisputed that the bell on the switch engine was ringing.

The following are the rules adopted by the company to govern the movement of the trains in the Lincoln yards. These were introduced in evidence and are set out in the opinion and are as follows (see pp. 70 and 71 of defendant's in error Brief on motion to dismiss):

On its printed time tables, such as were then used by engineers, rule 16 provided: "*All except first class trains will approach (enter and pass through the following named yards under full control), expecting to find main track occupied or obstructed: Albright, Fairbury, Lincoln, Belleville, Jansen, Phillipsburg.*" Subdivision b of rule 9 provided: "*The speed of trains in the city of Lincoln between M*

*street (two blocks west of passenger station) and Vine street (east of coal dock) must not exceed six miles per hour."* Rule 97a in the book of rules promulgated by defendant provided: "*Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks, protecting themselves against overdue trains. Extra trains must protect themselves within yard limits.*" The term "under full control" in rule 16 all of the witnesses testified means "to be able to stop within the vision of the engineer." It is conceded that 1486 was required, while passing through the company's yards in the city of Lincoln, to proceed under such control.

It is admitted of course, that Mr. Wright's engine was an extra and that under the rules it was not a first class train but was bound to run through the Lincoln yards under full control and was bound to watch out for switch engines or other trains that might be there.

The evidence shows that the switch engines are used in the yard for switching and while they are given the time on first class trains if not on schedule time they receive no other orders on other trains. The dispatcher does not give the train's time on the switch engine which is constantly working in the yards and all trains other than first class trains must look out for the switch engine.

The defendants in error introduced in evidence the company's rules and then rested. No evidence was introduced or is in the record save the rules themselves and the method of operating under them. No evidence was introduced that any other and different rules were in force on other railroads. No evidence of experts or any persons was introduced showing or tending to show any other rule or that the rules in force were not sufficient or that any other rule or rules would be more efficient. No evidence was introduced at all on the subject save the rules themselves and the court

submitted the sufficiency of the company's rules to the jury. The same rules which have been approved by the American Railway Association have been adopted and are in force on over 58,000 miles of railway and have been held time and again by the national courts and by other courts to be sufficient and reasonable as a matter of law, and yet these same rules which the national courts have held sufficient as a matter of law and have held it error to submit their sufficiency to a jury, the supreme court of Nebraska held insufficient as a matter of law. We earnestly urge that where the national courts have held the identical rules governing operations in yards sufficient as a matter of law, and where the state court, trying a case under the federal employers' liability act does not follow the holdings of the national court, but goes directly contrary thereto, on a writ of error to this court, the alleged error should be reversed.

It is our contention and on a motion of this kind we do not deem it proper to discuss all the merits of the case, that under the evidence introduced by plaintiff and the defendants, no case of negligence was made against the defendant at all. That the case should not have been submitted to the jury and that it should have been tried under the federal employers' liability act and if so, under the federal rules and under the holdings of the national courts, no negligence was proven warranting a recovery.

We submit that it would be an anomaly to allow one plaintiff trying a case under the federal employers' liability act in the state court to recover and another plaintiff with the identical same facts and record, fail to recover when trying his case in the federal court, and that when a state court is enforcing the federal employers' liability act and is trying a case thereunder, it must be tried according to the rules of law of the national courts in everything save as to pleadings.

We submit the following rules of law :

- I. The Court Will Not Decide Motions to Dismiss Before the Record is Printed When There is Any Question About the Facts on Which the Motion Rests.**

*St. Louis Nat'l. Bank v. United States Ins. Co. of St. Louis*, 25 L. Ed. U. S. S. Ct. 547.

*City of Waterville v. Van Slyke*, 29 L. Ed. U. S. S. Ct. 406.

- II. On a Motion to Dismiss, the Court Will Not Determine and Decide the Merits of the Case.**

*Bohanan v. State of Nebraska*, 118 U. S. S. Ct. 231, 6 Sup. Ct. Rep. 1049.

*Hecker v. Fowler*, 1 Black 95, 17 L. Ed. U. S. S. Ct. 45.

- III. The Administrators of an Engineer in the Employ of a Railway Company Operating a Lone Engine Being Taken From Fairbury, Nebraska, to Council Bluffs, Iowa, Killed While on Said Trip are Entitled to Maintain a Suit Against the Railway Company Under the Federal Employers' Liability Act.**

*No. Carolina R. R. Co. v. Zachary*, 58 L. Ed. U. S. S. Ct. 591, 232 U. S. 248.

- IV. If the Case is One Where the Employee is Employed by the Interstate Carrier in Such Commerce, Then the Federal Employers' Liability Act is Exclusive and it is Error to Try the Case Under a State Employers' Liability Act.**

*Toledo S. L. & West R. R. Co. v. Slavin*, U. S. Adv. Ops. 1914. 306.

*St. Louis S. F. & T. R. Co. v. Searle*, 229 U. S. S. Ct. '56, 51 L. Ed. U. S. S. Ct. 1129.

*No. Carolina R. R. Co. v. Zachary*, 58 L. Ed. U. S. S. Ct. 591. 232 U. S. 248.

*Mondoe v. N. Y. N. H. & H. R. Co.*, 56 L. Ed. U. S. S. Ct. 327. 223 U. S. S. Ct. 49.

- V. In Construing and Applying the Federal Employers' Liability Act the Decisions of the National Courts Control Over Those of the State Courts and in Determining When a Carrier is Guilty of Negligence Under the Federal Act, the Decisions of the Federal Courts Control, and if the State Court, Applying the Federal Act or in Trying a Case Which Should Have Been Tried Under Said Act, Erred in the Trial of a Case in Holding the Carrier Liable it is Such an Error as This Court May Review.

See cases and authorities cited under the following rules.

- VI. Where Under the Holdings of the National Courts There is no Sufficient Evidence of Negligence to Warrant a Recovery in a Case Arising Under the Federal Employers' Liability Act, and the State Court Allows a Recovery Upon a Writ of Error to This Court, the Case Should be Reviewed and Reversed, For it Would be an Anomaly if on a Given State of Facts Under the Federal Employers' Liability Act in a Federal Court no Recovery Would be Allowed, While if Brought in a State Court the Employee Should be Allowed to Recover.

We call attention to the court to section 8, page 15 of Mr. Robert's *Injuries to Interstate Employees*, published in 1915 by Maurice G. Roberts of the Missouri Bar, wherein he says:

"DECISIONS OF NATIONAL COURTS CONSTRUING ACT  
CONTROL.

"In construing the Federal Employers' Liability Act, the decisions of the national courts control over those of the state courts. For example, in determining when a carrier is guilty of negligence under the act; when an employe assumes the risk; what proof creates a dependency in death cases within the meaning of the act; whether the doctrine of *res ipsa loquitur* applies; whether there is any evidence tending to show liability sufficient for the case to be submitted to the jury; the measure of damages and instructions thereon, are all matters upon which the decisions of the national courts control."

*St. Louis Iron Mountain & Southern Ry. Co. v. McWhirter*, 229 U. S. S. Ct. 265, 56 L. Ed. 1179, reverses 145 Kentucky, 427.

Sections 1, 2 and 3 of the syllabus are as follows:

*"Error to State Court—Decision of Federal Question—Suit Based on Federal Statute.*

"1. A decision of the highest court of a state, which affirmed a judgment in favor of plaintiff in an action in which the right to relief was exclusively based upon the hours of service act of March 4, 1907, (34 tat. at L. 1416, chap. 2939, U. S. Comp. Stat. Supp. 11911, p. 1321), and the employers' liability act of April 22, 1908, (35 tat. at L. 65, Chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and in which, at the close of the evidence, defendant had requested the court to instruct the jury to find in its favor, necessarily involves an adverse determination of a Federal question, i. e., defendant's right to be shielded from responsibility under those statutes when properly applied, and a writ of error will therefore lie from the Federal Supreme Court to the state court.

*"Error to State Court—Federal Question—Decision on Non-Federal Ground.*

"2. A mere ruling by the highest state court in a suit based solely upon the hours of service act of March 4, 1907, and the employers' liability act of April 22, 1908, that there was testimony tending to show negligence, affords no basis for the contention that the judgment which affirmed a judgment below in favor of plaintiff, was rested upon that ground so as to deprive the Federal Supreme Court of jurisdiction of a writ of error to the state court, on the theory that the case was decided on an independent non-Federal ground.

*"Error to State Court—Federal Question—Evidence of Liability Under Federal Statute.*

"3. A contention in a state court in an action based solely upon a Federal statute that there was no evidence tending to show liability under that statute, presents a Federal question which, when denied, will support a writ of error from the Federal Supreme Court to the highest state court."

*Michigan Central Ry. Co. v. Vreeland*, 227, U. S. S. Ct. 59 57 L. Ed. 417.

VII. Where a Railroad Company Has Promulgated and Adopted a System of Rules That Yard Engines in Yard Limits Might Occupy Tracks Protecting Themselves Against First Class and Passenger Trains, and That Extra Trains Must Run Through Yards Under Control, Looking Out For Yard Engines and Other Engines, and Where Such a System of Rules Has Been Made Familiar to Its Employees and the Road Has Been Operated Under Them, the Question of Their Sufficiency and Reasonableness is a Question of Law For the Court, and, in the Absence of Any Testimony on the Subject as to the Insufficiency of the Rules or That Other Rules Would be More Efficient or Have Been Adopted by Other Railroads, in the National Courts Such Rules Are Held Reasonable and Sufficient as a Matter of Law and the State Court Applying the Federal Employers' Liability Act or in a Case Arising Under Said Act Which Should Have Been Tried Under the Federal Act Should be Governed Thereby, and if the State Court Disregards the Holdings of the Federal Courts and Either Submits the Sufficiency of the Rules to the Jury or as in the Case at Bar, Holds Them Insufficient as a Matter of Law, Such Error May be Reviewed by the Party Aggrieved by This Court.

There is no dispute as to what the rules are, as to how the trains were operated under them and that the deceased was familiar with the rules and knew them, as he had a copy of them on his person at the time of his death and had been examined concerning them previously, and had signed a written statement stating that he was familiar with the rules, etc., prior to being employed.

We are fortunate in having a vast number of decisions where courts have passed on the sufficiency of these very same rules. This, because these rules have been adopted by the American Railway Association and are in force on 8,000 miles of railroad in this country, and in every decided case, both national and state, save that of the Nebraska

—supreme court in this case, these identical rules have been held reasonable and sufficient as a matter of law.

It has been held that where railroad men and railroad companies have promulgated and adopted a system of rules and have operated their business under its rules, that in the absence of some testimony to the contrary, the sufficiency of these rules can not be submitted to the jury. It has been held that a rule which makes all but first class trains which are passenger trains look out for yard engines which are constantly moving about in the yards and requires that the engine that simply passes through the town should be under full control and permits the switch engine doing its different work at different places in the yards to move about without being notified that other than first class trains are in the yard, is a proper and sufficient rule. These switch engines are constantly in motion and to require the company to notify trains passing through the switch yards of the presence and movements of this switch engine would impair their functions and limit their work and so the rules require that all but passenger trains must pass through the Lincoln yards under full control and must look out for the switch engine and that it is their duty so to do, giving the switch engine the right of way over all but the first class trains.

We call attention to the late case of the *Central Railway Company of New Jersey v. Young*, 200 Fed. page 359. The syllabus is as follows:

"1. A Railroad rule provided that within yard limits engine might occupy main tracks, protecting themselves against scheduled trains, and that extra trains must run through the yards under control, looking out for yard engines and other extras. Held, that such rule imposed the duty on the engineer of an extra freight train to run through the yards with his train under control, and relieved the crews of yard engines from the duty of protecting themselves against extra freight trains running through yards, and this, through the condition of the weather made it impossible for the engineer of an extra freight train to see but a short distance ahead of him."

"2. A railroad rule providing that yard engines in yard limits might occupy main tracks, protecting them-

selves against scheduled trains, and that extra trains must run through yards under control, looking out for yard engines and other extras, having been adopted by the American Railway Association, and by first class railroads generally, was reasonable."

"3. "Where a railroad had adopted a system of rules, which have been made familiar to its employes, and the road has been operated under them with success, the question of their reasonableness and sufficiency is a question of law for the court in the absence of any conflict or expert testimony on such question."

"4. Where a railroad rule required extra freight trains to run through yards under control, looking out for yard engines and other extras, the words 'under control' required the engineer to run at such a speed as would enable him to bring his train to a stop within vision, and this without reference to whether the weather was clear or foggy."

This case contains a complete discussion of the subject and a resume of the decided cases.

See:

*Bailey on Personal Injuries*, Vol. 1, Second Ed.  
page 797.

*Labatt on Master and Servant*, Vol. 3, page 2948.

*C. R. I. & P. Ry. Co. v. Ship*, 174 Fed. 313.

*Rosney v. R. R. Co.*, 135 Fed. 311.

*Great No. Ry. Co. v. Hooker*, 170 Fed. 154.

*Kansas Ry. Co. v. Dye*, 70 Fed. 24.

*Little Rock etc. v. Barry*, 84 Fed. 944.

*Scott v. Eastern Ry. Co.*, 90 Minn. 135, 95 N. W. 892.

*Vedder v. Fellows*, 20 N. Y. 126-133.

*Enright v. Railway Co.*, (Mich.) 53 N. W. 536.

*Berrigan v. New York etc. Ry. Co.*, 30 N. E. 57.

*Whalen v. Michigan etc.*, 72 N. W. 323.

*Kenefick Hammond Co. v. Robin*, 91 S. W. 179,  
(Ark.).

*Ward v. Manhattan Ry. Co.*, 95 App. Div. Rep. S.  
C. (N. Y.) 437.

*Wolsey v. Railroad Co.*, 33 Ohio State 227.

*Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 748.

*Larow v. N. Y. L. E. & W. R. Co.* 61, Hun. 11, 15 N. Y. Supp. 384.

*Thurston v. Phil., Etc. Ry. Co.*, 62 Act 689.

*Avery v. N. Y. Cent.* 84 N. Y. S. 646.

*Smith v. N. Y. C.*, 34 N. Y. S. 8h1.

*Miles v. N. Y. C.*, 43 N. Y. S. 751.

*Cocoran v. N. Y. N. H. R. Co.*, 78 N. Y. S. 953.

In the above cases the identical rules are involved, the court has held that these identical rules were reasonable and sufficient as a matter of law. The national courts having so held it was the duty of the state court in applying the federal employers' liability act to withdraw that question from the jury and to so hold. The supreme court of the state of Nebraska not only held that the lower court did not err in submitting them to the jury but held them insufficient as a matter of law. Thus, we have the situation that if the case at bar was being tried in the national courts and the federal employers' liability act was being enforced there, the court would have held on the plaintiff's claim of negligence as to the insufficiency of the rules that there was nothing to be submitted to the jury and that the rules were sufficient as a matter of law. If, therefore, the state court had tried this case under the federal employers' liability act as it should have done, it would have applied and enforced the rules of law of the national courts and would have held or would have erred, if it did not so hold, that being governed by the rules of the national courts such operating rules were sufficient as a matter of law and by the trying of this case under the state act the plaintiff in error was aggrieved and prejudiced because it could not have applied the rules of law governing and controlling as announced by the federal courts.

**VIII. Where a Case is Brought in the State Court and Under the Facts the Case Arises Under the Federal Employers' Liability Act But the State Court Tries the Case Under the State Employers' Liability Act and Where a Verdict is Affirmed on the**

**Facts as Tried Under the Latter Act When if the State Court Had Applied the Federal Act and Enforced the Rules of Law of the National Courts, no Judgment Would Have Resulted Against the Plaintiff in Error Because of the Holdings of the National Courts, Then the Plaintiff in Error is Prejudiced by the Fact That the Case Was Tried Under the State Act and the Case May be Reviewed by This Court.**

- IX. If in the Trial of a Case Arising Under the Federal Act, But Which the State Courts Try Under State Act Error Exists According to the Rules of Law of the National Courts, the Case Will be Reviewed by This Court.**

The assignments of error appearing on page 35 of the defendant in error's brief, assignments 1, 2, 3 and 4, allege error in trying the case under the state act. Assignment 5 is to the error of the trial court in not directing a verdict in favor of the plaintiff in error. Assignments 6 and 7 as to alleged error in submitting the case to the jury in not holding that under the evidence no recovery could be had. Assignment 9 is to the alleged error of the court in submitting the sufficiency of the company's rules to the jury and in holding that they were as a matter of law insufficient for the reason that under the federal employers' liability act no recovery could be had based on such alleged grounds of negligence.

We submit that the plaintiff in error is prejudiced because of the trying of the case under the state act, in that it was entitled to have the case tried under the federal act and to have the rules of the national courts enforced in trying it. To both refuse to try the case under the federal act and refuse to apply the federal rules as to the negligence and as to sufficiency of proof to warrant a judgment takes away the company's rights in the premises and is error which this court should review.

- X. Even Though Some Evidence May be Found in the Record Tending to Prove That the Lone Engine Was Ultimately Destined for the Repair Shops, Still This Would not Deprive The Crew in Charge of Said Engine Running From One State**

**to Another of Their Rights Under the Federal Employers' Liability Act and That at Said Time They Would be Employed in Interstate Commerce.**

Counsel have cited numerous cases arising under the safety appliance act holding that where a loan engine or car was defective and failed to comply with the act when the carrier was taking the car from one point to another for the purposes of repairing the car so as to comply with the act, it could not be held criminally for the reason that it is a matter of common knowledge that it is necessary in order to repair cars to take them to different points on the line of a railway company and when the couplers or other safety appliances become defective it would be impossible for the company to legally move the cars even for the purposes of repair, were the rule otherwise.

However, we submit that the cases arising under the safety appliance act do not aid us, as prior to the 1903 amendment, it was necessary to prove in order to prove a violation of the law that the car having the defect was at the time of the injury or alleged violation "hailed or permitted to be hauled or used on its line in moving interstate traffic." Since said act of 1903, every interstate railroad is required to equip all of its cars as provided for by the safety appliance act where used in intrastate or interstate. While the law must be reasonable and must of course, refuse to subject the carrier to penalties because of moving its cars when not complying with the safety appliance act when the carrier is moving them for the sole purposes of complying with the act, nevertheless, when an empty car or a lone engine for whatever purposes is going from a point in one state to a point in another, within the meaning of the federal employers' liability act, the crew moving it are engaged in interstate commerce.

*No. Carolina R. R. Co. v. Zachary*, 58 L. Ed. U. S. S. Ct. 591, 232 U. S. 248.

*Roberts' Injuries to Interstate Employees*, page 113.

"The Supreme Court of Nebraska held that an engineer running a 'light' engine between two points in that state, which, the defendant claimed, was ultimately destined to a point in another state, was not engaged in interstate commerce. Under the ruling of the Supreme Court in the

Zachary case, *supra*, an employe hauling empty cars from a point in one state to a point in another is engaged in interstate commerce and the ruling in the Wright case is wrong if the engine was destined to another state and it matters not that the employe was not going beyond the state. It is not, however, very clear in the report of the case whether the engine was on its way to machine shops in another state."

We therefore, respectfully submit that the motion filed by the defendants in error be overruled.

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